COURT OF APPEALS
DECISION
DATED AND RELEASED

June 1, 1994

No. 93-1989

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

DALE E. REICH,

Plaintiff-Appellant,

v.

MICHAEL SPELLMAN, ASSISTANT CHANCELLOR, UNIVERSITY RELATIONS, UNIVERSITY OF WISCONSIN-WHITEWATER, JAMES R. CONNOR, FORMER CHANCELLOR, UNIVERSITY OF WISCONSIN-WHITEWATER, and BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Walworth County: John R. Race, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

BROWN, J. This is a "whistleblower" case. Dale E. Reich brought against his former superiors under 42 U.S.C. § 1983 and §895.65, STATS.,[1]

---

[1] Section 895.65 STATS., provides:

(1) In this section:

(a) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in party, of a penalty.

(b) "Employe" means any person employed by any governmental unit except:

1. A person employed by the office of the governor, the courts, the legislature or a service agency under subch. IV of the ch. 13.

2. A person who is, or whose immediate supervisor is, assigned to an executive salary group under s. 20.923.

(c) "Governmental unit" means any association, authority, board, commission, department, independent agency, institution, office, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature, the office of the governor and the courts. "Governmental unit" does not mean any political subdivision of the state or body within one or more political subdivisions which is created by law or by action of one or more political subdivisions.

(d) "Information" means information gained by the employe which the employe reasonably believes demonstrates:

1. A violation of any state or federal law, rule or regulation.

2. Mismanagement or abuse of authority in state government, a substantial waste of public funds or a danger to public health and safety.

(2) An employe may bring an action in circuit court against his or her employer or employer's agent, including this state, if the employer or employer's agent retaliates, by engaging in a disciplinary action, against the employe because the employe exercised his or her rights under the first amendment to the U.S. constitution or article I, section 3, the Wisconsin constitution by lawfully disclosing information or because the employer or employer's agent believes the employe

(continued...)

([1] ... continued)

so exercised his or her rights. The employe shall bring the action within 2 years after the action allegedly occurred or after the employe learned of the action, whichever occurs last. No employe may bring an action against the department of employment relations as an employer's agent.

(3) If, following the close of all evidence in an action under this section, a court or jury finds

arguing that they retaliated against him because he exercised his First Amendment right to free speech. The trial court granted summary judgment against him on both claims. We affirm the trial court on

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that retaliation was the primary factor in an employer's or employer's agent's decision to engage in a disciplinary action, the court or jury may not consider any evidence offered by the employer or employer's agent that the employer or employer's agent would have engaged in the disciplinary action even if the employe had not disclosed, or the employer or employer's agent had not believed the employe disclosed, the information.

(4) If the court or jury finds that the employer or employer's agent retaliated against the employe the court shall take any appropriate action, including but not limited to the following:

(a) Order placement of the employe in his or her previous position with or without back pay.

(b) Order transfer of the employe to an available position for which the employe is qualified within the same governmental unit.

(c) Order expungement of adverse material relating to the retaliatory action or threat from the employe's personnel file.

(cm) Order the employer to pay compensatory damages.

(d) Order the employer to pay the employe's reasonable attorney fees.

(e) Order the employer or employer's agent to insert a copy of the court order into the employe's personnel file.

(f) Recommend to the employer that disciplinary or other action be taken regarding the employer's agent, including but not limited to any of the following:

1. Placement of information describing the agent's action in his or her personnel file.

2. Issuance of a letter reprimanding the agent.

(continued...)

(' ... continued)

3. Suspension.

4. Termination.

the 42 U.S.C. § 1983 claim because Reich's superiors are entitled to qualified immunity. We also affirm on the state claim because we agree with the trial court that the event causing the injury occurred on January 31, 1991 and that Reich therefore violated our notice of claim statute.

Reich worked for the University of Wisconsin-Whitewater as Director of News and Publication. Defendant James R. Connor was the Chancellor at the University of Wisconsin-Whitewater. Defendant Michael Spellman was Reich's immediate supervisor.

In the spring of 1990, Spellman informed Reich that The Register, a company which had a contract to print the newspaper of the University of Wisconsin Foundation-an alumni association-would not receive a new printing contract for the foundation's newspaper. This was because it had not made a sufficient contribution to a fund-raising campaign that Spellman was conducting. If The Register inquired as to why it lost the printing contract, Spellman advised Reich to tell The Register only that the foundation was unhappy with the quality of the printing. Spellman further advised Reich that The Register's problems were sufficient to take the business elsewhere.

Reich believed that it was morally incorrect to withdraw the contract grounded upon The Register's refusal to make a substantial donation. He was unsure of whether this was legal or not. Although Reich believed that Spellman's

actions were morally incorrect, he did not confront Spellman or Connor with his views in the spring of 1990. Nor did he contact the district attorney's office or other law enforcement authorities.

In the fall of 1990, Reich received a telephone call from The Register asking why it had not received the printing job for the fall issue of the foundation's newspaper. Reich first told The Register that it had not received the contract because of printing problems. Later, Reich called The Register back and informed it that in addition to the printing problems, The Register had lost the contract because it had not donated a sufficient contribution to the fund-raising campaign.

After Spellman found out about Reich's disclosure to The Register, he chastised Reich for breaching management confidence and no longer confided in Reich. Spellman alleges that following Reich's disclosure, Spellman and Reich avoided each other more often, and that the situation between them had a negative impact upon the staff.

On November 19, 1990, Reich submitted a letter of resignation to Connor, giving no reasons. A week later, Connor refused to accept the resignation and stated that he would find Reich another position on campus. Reich alleges the Connor indicated he would tear up the resignation letter and that his resignation was withdrawn.

On January 31, 1991, Connor sent

Reich a letter informing him that he was unable to find a job on campus for Reich and he was accepting Reich's November 19, 1990 letter of resignation. Reich's last day of employment was to be June 30, 1991. After receiving this letter, Reich objected to the proposed termination of his employment, claiming that his resignation had been withdrawn. However, Connor did not rescind the January 31 termination letter between its issuance and June 18, 1991. In fact, Connor strongly reaffirmed the January termination letter twice during that time period. Reich's attorney sent Connor a letter on May 7, 1991, stating that if Reich was terminated, his rights under §895.65 STATS., would be violated. On June 18, 1991, Connor offered Reich another position at the university which reduced his salary from $50,000 a year to $35,000 a year. Reich alleges that he was told he could either accept this reassignment or be fired. Reich filed a Notice of Claim on September 30, 1991, alleging that the event causing injury was the June 30, 1991 transfer, demotion and reduction in pay.

Reich then filed suit against the defendants in December 1991, alleging that they had violated 42 U.S.C. § 1983 and § 895.65 STATS., by abridging his First Amendment free speech rights when he was demoted and transferred in retaliation for his disclosure to The Register. The trial court granted summary judgment for the defendants on both claims. The trial court reasoned that Connor and Spellman were immune from the suit under 42 U.S.C. § 1983 because Reich had not established violation of a clear right by Connor and

Spellman. The court also reasoned that Reich had failed to file a timely Notice of Claim within 120 days of the injury on the state action because the injury occurred with the January 31, 1991 letter of termination and Reich did not file a Notice of Claim until September 30, 1991-242 days later. Reich now appeals the trial court's granting of summary judgment on both claims.

I. Qualified Immunity

As a preliminary matter, summary judgment may not be granted where there is a genuine issue of material fact. ***Driver v. Driver***, 119 Wis.2d 65, 69, 349 N.W.2d 97, 100 (Ct. App. 1984). Reich directs our attention to several factual disputes. However, we deem none of these factual disputes material.

The issue of whether the defendants are entitled to qualified immunity is a question of law. ***Barnhill v. Board of Regents***, 166 Wis.2d 395, 406, 479 N.W.2d 917, 921 (1992). Therefore, we decide this issue without deference to the decision of the trial court. ***Id.***

Qualified immunity is an issue appropriately addressed and resolved at the summary judgment stage. ***Id.*** at 415, 479 N.W.2d at 925. Qualified immunity allows courts to quickly terminate insubstantial lawsuits, thus protecting public officials against the danger that the fear of being sued will hamper them in the proper discharge of their duties. ***Connor v. Reinhard***, 847 F.2d 384, 387 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988).

To carry out this goal of protecting public officials, the United States Supreme Court has articulated that qualified immunity protects public officials from suit if their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have known. ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982); *see also* ***Barnhill***, 166 Wis.2d at 406, 479 N.W.2d at 921. Therefore, the defendants in the instant case are entitled to qualified immunity if they did not violate a clearly established constitutional right of Reich.

Additionally, Reich bears the burden of establishing the existence of the clearly established constitutional right. ***Barnhill***, 166 Wis.2d at 409, 479 N.W.2d at 922. The generality of the clearly established right must be specific enough so that a reasonable public official could have realized that his or her conduct was unlawful. Merely alleging a general violation of a constitutional right is insufficient to justify withholding qualified immunity. ***Id.*** at 408, 479 N.W.2d at 922. For example, claiming a public official's conduct violated a plaintiff's First Amendment right to free speech is too general. ***Id.*** On the other hand, this does not mean an official is protected unless the very action in question has been previously held unlawful. ***Anderson v. Creighton***, 483, U.S. 635, 640 (1987). Rather, there must be sufficiently analogous case law on the "clearly established right" to provide the public official with guidance on the lawfulness of the conduct in question.

Barnhill, 166 Wis.2d at 408, 479 N.W.2d at 922.

In the instant case, Reich argues that his right to be free from retaliation against his exercise of free speech was violated when the defendants transferred and demoted him from his previous job. it is clearly established that a public official may not retaliate against an employee on a basis that infringes the employee's constitutionally protected interest in freedom of speech. *Id.* at 409, 479 N.W.2d at 923. In order to determine whether the defendants violated this right, it is necessary to balance a public employer's interest in confidentiality or effective functioning of the employer's business against the employee's interest in free speech. *See id.* at 410, 479 N.W.2d at 923. If a defendant acts pursuant to a superior interest, then the defendant is entitled to qualified immunity. *Glass v. Dachel*, 2 F.3d 733, 745 (7th Cir. 1993).

In *Glass*, a sheriff's deputy reported to a fellow deputy that he believed his immediate supervisor had stolen a lawn mower from the department. The deputy was later given a letter of reprimand by the sheriff. The sheriff contended that he felt that the deputy's comments to the fellow officer should have been taken elsewhere in order to maintain the harmony and morale within the sheriff's department. *Id.* at 736-37. The court held that the sheriff was entitled to qualified immunity if he could prove that this was the reason he reprimanded the deputy because the law was clearly

established that a defendant does not violate the First Amendment if the defendant is acting pursuant to a superior interest. *Id.* at 745. As an example of a superior interest, the court gave the effective and efficient operation of a sheriff's department. *Id.*

> Other factors which are used to determine a superior interest are:
>
> (1) the need to maintain discipline or harmony among co-workers;
> (2) the need for confidentiality;
> (3) the manner, time, and place of the employee's speech;
> (4) the need to curtail conduct which impedes the employee's proper and competent performance of his [or her] daily duties;
> (5) the need to encourage a close and personal relationship between the employee and his [or her] superiors, where the relationship calls for loyalty and confidence; and
> (6) the context in which the speech occurred.

Barnhill, 166 Wis.2d at 411, 479 N.W.2d at 923. Our supreme court has recognized than and employer's interest in confidentiality and discipline can outweigh and employee's interest in free speech. *See id.* at 400, 479 N.W.2d at 919.

In *Barnhill*, the plaintiff worked for

the University of Wisconsin's Survey Research Laboratory (WSRL). He refused an assignment asking shoppers at malls whether they would be deterred from coming if protests were staged there. The plaintiff believed that it was inappropriate for WSRL to perform the shopping survey. He later leaked the survey questions to a newspaper and was fired for breaching WSRL's confidentiality. *Id.* at 403-05, 479 N.W.2d at 919-21. The plaintiff then sued his superiors at WSRL, claiming that his First Amendment right to free speech had been violated. *Id.* at 405, 479 N.W.2d at 921. *Barnhill* held that the defendants were entitled to qualified immunity. *Id.* at 414, 479 N.W.2d at 925.

The court reasoned that WSRL had a strong interest in maintaining the confidentiality of survey questions because confidentiality of survey questions was necessary to assure valid research results and to protect WSRL's reputation. *Id.* at 411, 479 N.W.2d at 923. A reputation for disclosing survey questions before the survey was finished would have had a substantial negative impact on the business of WSRL. *Id.* WSRL also had an interest in disciplining Barnhill to deter other employees from violating the confidentiality rules in the future. *Id.* at 411-12, 479 N.W.2d at 923. Therefore, the court stated that a reasonable public official could have concluded that the plaintiff's breach of confidentiality was sufficient to permit his discharge, *id.* at 412, 479 N.W.2d at 924, because it was not clearly established in 1985 that the plaintiff's

free speech interest outweighed the defendant's interest in confidentiality and discipline. ***Id.*** at 414, 479 N.W.2d at 925.

Turning to the instant case, the defendants are entitled to qualified immunity if they can show that they were acting pursuant to a superior interest. They argue that they had a superior interest in deterring other employees from attempting Reich's tactics. We are satisfied that the defendants' need for confidentiality, the need to encourage a close and personal relationship between Reich and his superiors, and the time, place and manner of Reich's speech weigh against Reich's interest in free speech. Therefore, we hold that the defendants are entitled to qualified immunity because the law in 1991 was not clearly established that Reich's interests outweighed those of the defendants.

As in ***Barnhill***, Reich violated his employer's interest in confidentiality. In ***Barnhill***, the employee signed a pledge of confidentiality. ***Id.*** at 403, 479 N.W.2d at 920. Similarly, Spellman specifically advised Reich not to tell The Register that it was losing the printing contract because of its failure to donate money to Spellman's fund-raising campaign. However, like the employee in ***Barnhill***, Reich divulged confidential information anyway. Reich deliberately undermined any future working relationship that his superiors may have had with The Register by disclosing confidential information. This factor weighs against Reich's free speech interest.

Additionally, Reich's disclosure to The Register damaged any close and personal working relationship that he may have had with Spellman. After discovering Reich's disclosure, Spellman no longer confided in Reich. Reich and Spellman also avoided each other more often than before the disclosure. Spellman believed that the situation between the two had a negative impact upon the office staff. Therefore, after all this, it would be difficult for Spellman and Reich to have a close and personal working relationship.

The time, place and manner of Reich's speech also weighs against him. Reich could only say that he believed Spellman's act of conditioning business upon donations to be morally incorrect. He was unsure of whether any laws had been broken. However, he did not confront Spellman or Connor with his views, nor did he contact the district attorney or other law enforcement authorities. Instead, he chose to unilaterally disclose confidential information to a client of the foundation. Following this unilateral disclosure of confidential information, Spellman could hardly count on Reich to abide by and carry out his orders.

Weighing these three factors against Reich's free speech interest, we recognize that a reasonable public official could believe that Reich's breach of confidentiality, disruption of a close and personal working relationship, and time, place and manner of speech were sufficient to permit his reprimand. Therefore, we hold that Connor and Spellman are entitled to qualified immunity.

Finally, we are not insensitive to the argument that the employer's interest in confidentiality and a close and personal working relationship could swallow up the employee's free speech interest. Whistleblowers would not be protected if an employer's interest automatically outweighed an employee's free speech interest anytime the employee disclosed confidential information. This would be true because, by their very nature, whistleblowers expose information to the public that the employer wants kept secret.

However, this is not our holding here. In the instant case, Reich does not assert that he believed any laws were broken by the defendants. He only states that he found their bidding practices immoral. This is similar to ***Barnhill*** where the employee found WSRL's behavior immoral. As in that case, the employee's free speech interest has less weight. An employee's interest in free speech is greater when illegal conduct is exposed. In such a situation, the employee's free speech interest may outweigh the employer's interest in confidentiality or a close and personal working relationship. ***Cf. Giacalone v. Abrams*** 850 F.2d 79, 87 (2d Cir. 1988) (noting that a plaintiff's First Amendment interest in expressing ethical concerns is of less magnitude than allegations of a cover-up). Therefore, in the instant case, we affirm the trial court on the 42 U.S.C. § 1983 claim.

II. Notice of Claim

Since there is no factual issue presented for determination on this issue, the only question is one of law concerning whether Reich complied with the notice of claim statute § 893.82(2), STATS., before filing his state action under §895.65, STATS. ***See Sambs v. Nowak***, 47 Wis.2d 158, 164, 177 N.W.2d 144, 147 (1970). Section 893.82(3) states in part:

> Except as provided in sub.(5m), no civil action ... may be brought against any state office, employe or agent ... unless within 120 days of the event causing injury ... giving rise to the civil action ... the claimant in the action ... serves upon the attorney general written notice of a claim ....

Additionally, § 893.82(2m) states that "[n]o claimant may bring an action against a state officer, employe or agent unless the claimant complies strictly with the requirements of this section."

The issue in dispute here is whether the event causing Reich's injury was the January 31, 1991 termination letter, or whether it was his transfer and demotion at the end of June 1991. If the event causing the injury was the January termination letter, then Reich's state claim must be dismissed because he did not file a Notice of Claim until September 30, 1991--242 days after the event. However, if the event causing the injury was the June transfer and demotion, then the trial

court must be reversed because Reich would have filed his Notice of Claim within the 120-day period following the event.

The issue concerns when Connor and Spellman retaliated against Reich for his exercise of free speech. In ***Jicha v. DIHLR***, 169 Wis.2d 284, 485 N.W.2d 256 (1992), Jicha was terminated form his job for absenteeism. ***Id.*** at 288, 485 N.W.2d at 257. Jicha's employer had an appeals process in which his termination could be overturned by the company president. ***Id.*** at 288-89, 485 N.W.2d at 258. Jicha appealed his termination to the company president. However, the president refused to reinstate him. ***Id.*** Jicha then claimed that his employer violated the Wisconsin Family and Medical Leave Act (FMLA) in firing him. ***Id.*** at 289, 485 N.W.2d at 258. A complaint alleging violation of FMLA must be filed within thirty days of the violation. Section 103.10(12)(b), STATS. Jicha filed his complaint less than thirty days after the company president refused to reinstate him but more than thirty days after he had received the initial notice of his termination. ***Jicha***, 169 Wis.2d at 289, 485 N.W.2d at 258.

Jicha argued that the thirty-day statute of limitations did not begin to run until he received his denial of reinstatement from his appeal. ***Id.*** at 293, 485 N.W.2d at 260. Our supreme court held that the thirty days began running when the plaintiff received his initial notice of termination. ***Id.*** at 297, 485 N.W.2d at 261. The court agreed that the issue in the case was when the plaintiff reasonably knew of the FMLA violation, not

whether he reasonably thought he would be reinstated. *Id.* at 296, 485 N.W.2d at 261. The court stated that the plaintiff reasonably should have known that a violation occurred upon receipt of his initial termination letter. *Id.*

We conclude that the reasoning of *Jicha* disposes of this case in favor of the defendants. As in that case, Reich reasonably should have known that the defendants may have been retaliating against him for his exercise of free speech when he received the January 31, 1991 letter of termination. In fact, Reich was aware of the alleged retaliation. Reich's attorney sent Connor a letter in May of 1991, stating that if the university should follow through with its termination of Reich, then Reich's right to free speech under §895.65, STATS., would be violated. Moreover, there is no allegation or evidence that the defendants had withdrawn the January termination letter. Therefore Reich knew that he was to be terminated on June 31[sic]. The possibility that Reich would only be transferred and demoted did not change this fact. Therefore, the June transfer and demotion did not change when the event causing the injury occurred. The transfer and demotion only changed the degree of injury. We hold the Reich did not comply with the 120-day notice of claim because the event causing the alleged violation of §895.65 was the January 31, 1991 letter of

termination.[2]

For the above reasons, we affirm the trial court on both issues.

By the court.--Judgment affirmed.

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[2] The parties have not briefed and we express not opinion on whether "qualified immunity" is available in an action brought pursuant to § 895.65, STATS.

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You are hereby notified that the court has entered the following order:

No. 93-1989 Reich v. Spellman, et at.
L.C.#91CV747

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiff-appellant-petitioner Dale E. Reich, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Abrahamson, J., did not participate.

Marilyn L. Graves
Clerk of the Supreme Court

STATE OF WISCONSIN WALWORTH COUNTY
CIRCUIT COURT BRANCH III:

DALE E. REICH,

Plaintiff,

vs. Case No. 91-CV-747

MICHAEL SPELLMAN,
JAMES R. CONNOR and
BOARD OF REGENTS,

Defendants.

MEMORANDUM DECISION ON
DEFENDANT STATE OF WISCONSIN'S
MOTION FOR SUMMARY JUDGMENT

I

PROCEEDINGS TO DATE

The plaintiff, Dale E. Reich, began this action against the University of Wisconsin-Whitewater, Assistant Chancellor Michael Spellman, former Chancellor James R. Connor, and the Board of Regents on December 9, 1991. Plaintiff alleged a 42 U.S.C. §1983 violation alleging the defendants abridged his freedom of speech (First Amendment rights) by state action.

Plaintiff alleged also the State, through its Board of Regents, retaliated against the plaintiff for disclosing to the Whitewater Register which had been supplying printing services to the University for failure to make an adequate contribution to the University's fund drive.

The defendants answered denying the

allegations of the complaint and alleging the affirmative of failure of proper notice under §893.82, Wis. Stats., and also alleging the defendants have qualified immunity, immunity on the grounds the acts alleged were discretionary and alleging sovereign immunity.

The defendants moved to dismiss the §895.65 action for failure to allege notice. This court dismissed plaintiff's complaint but allowed plaintiff to replead. Plaintiff repleaded. Defendants moved for summary judgment. On February 8, 1993, the matter was argued and a briefing schedule set up. It is now ready for decision.

II
APPEARANCES

Plaintiff appeared by Soffa & Devitt, by Attorney Russell W. Devitt and Attorney David Honan, Whitewater, Wisconsin.

Defendants appeared by the Wisconsin Department of Justice, James E. Doyle, by Assistant Attorney General, Michael J. Losse, Madison, Wisconsin.

III
A
AS TO QUALIFIED IMMUNITY

The operative federal statute section is 42 U.S.C. §1983:

> A. Definition
> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the

> District of Columbia, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The jurisdiction of this court to hear 42 U.S.C. §1983 cases was determined in Terry v. Kolski, 78 Wis. 2d 475 (1976 Sup. Ct.) thus:

> The county court in which this action was brought was an appropriate forum. As was conceded by Milwaukee county's corporation counsel, and as we have demonstrated from analysis of the relevant federal statutes, the circuit courts of Wisconsin, as courts of general jurisdiction, may entertain sec. 1983 actions. The Constitution of the State of Wisconsin, Art. VII, sec. 8, provides:
>
> "The circuit courts shall have original jurisdiction in all matters civil and criminal within this state, not excepted in this constitution, and not hereafter prohibited by law...."

The defendants moved for summary judgment citing qualified immunity under

Rule §802.08(2).

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> - - - - -
>
> (3) Supporting papers. Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence. Copies of all papers or parts thereof referred to in an affidavit shall be attached thereto and served therewith, if not already of record. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so

> respond, summary judgment, if appropriate, shall be entered against such party.

This court's methodology in reviewing the defendants' motion for summary judgment as set forth above and in the cases is thus:

> Wright v. Hasley, 86 Wis. 2d 572 (Sup. Ct. 1978).
>
> We approve the trial court's conclusion that a material issue of fact remains...and (plaintiff) was entitled to a trial. Under such circumstances summary judgment is appropriate, and the plaintiff should be granted a trial on the merits.
>
> Heck & Paetow Claim Service, Inc. v. Heck, 93 Wis. 2d 349 (1980).
>
> The summary judgment procedure does not function as a substitute for a trial of any genuine issue of material fact, but permits a decision based on affidavits, records and for depositions. (Cits. omitted)
>
> The party moving for summary judgment must demonstrate that a trial is not necessary and establish a record sufficient to demonstrate to the satisfaction of the court that there is no triable issue of material fact on any issue presented. (Cit.

omitted)

> Any reasonable doubt as to the existence of a genuine issue of material fact must be resolved against the moving party, (Cits. omitted)
>
> If the trial court has determined the movant has proved to the court's satisfaction that there is no genuine issue of material fact as a matter of law, then the trial court should enter judgment.

There is no lack of controversy as to the facts and the parties motivations. To muddy the waters further, this court blundered when it asked the parties what the status of the University of Wisconsin-Whitewater Foundation was and its role here. The response was a substantial amount of exhibits which seem to indicate that the University of Wisconsin-Whitewater Foundation is a not-for-profit non-stock corporation which is not relevant here as the private corporation is not being sued nor could it be in the context of a §1983 action. The court need not and does not decide that issue here.

Again there is no lack of controversy as to the facts. As part of plaintiff's second affidavit, a newspaper article was annexed. This article was published April 22, 1991, in the Janesville Gazette [a daily newspaper of general circulation in Whitewater, Wisconsin]. I quote from it not as a source of evidentiary facts but rather to flesh out and frame some of the

issues that would be developed at trial:

> Paper refuses to donate, loses contract: Ex-employee
>
> MADISON - A former UW-Whitewater employee claims the school transferred a contract from the Whitewater Register because the firm did not contribute enough to a university building fund.
>
> Dale Reich, former news and publications director for the university, has filed a claim with the state attorney general's office alleging retaliation when he informed the newspaper of the school's decision.
>
> Reich claims he was demoted and his pay cut by $14,000 a year as a result of the incident.
>
> Reich's claim alleges that Assistant Chancellor Michael Spellman announced in the fall of 1990 that the Register would not be awarded the printing contract.
>
> Reich claims that was "because the principals of the Whitewater Register did not make what Spellman felt to be a sufficiently generous contribution for the new multi-purpose auditorium."
>
> When Tom Coe, register editor

and publisher, asked why the university transferred the contract, Reich told him about Spellman's comments regarding contributions to the auditorium project, according to the claim.

Spellman admonished him for a "breach of management confidence," Reich said.

Coe would not comment on Reich's claim.

"I assume this will end up in court, so I don't think I should make any statements," he said.

Spellman would not comment directly on Reich's claim that he cut off the Register from the university contract because the newspaper rejected a request for a contribution.

The rejection "was not the primary factor" in transferring the printing contract, Spellman said. "There was a problem with the Whitewater Register in the printing of the summer issue of the UW-Whitewater Today, a campus publication funded by the UW-Whitewater Foundation. A decision was made to transfer the printing contract to another vendor.

"In the months that followed, efforts were made to explain this action to the owners of the

> Whitewater Register and since that time the issue has been fully resolved with them," Spellman said.

This could then readily become a three-way issue and a jury would be called upon to sort these claims out.

One must be careful not to lose sight of the issues presented for this motion, however. The plaintiff in his affidavit of October 29, 1992, states:

> 12. It should be noted that while I was unhappy with the quality of printing which the Whitewater Register was doing on "Whitewater Today," it was not the reason why they lost their right to bid and receive a contract. The reason was Mr. Spellman's order to me that the Register be excluded from the chance to obtain further printing business from the University in light of their unwillingness to give sufficiently to the auditorium campaign.

In Barnhill v. Board of Regents, 166 Wis. 2d 395 (Sup. Ct. 1992), the Wisconsin Supreme Court stated at page 406:

> 1. QUALIFIED IMMUNITY
>
> The issue of qualified immunity is a question of law that is to be decided by the court, not the jury. Rakovich v. Wade, 850 F.

2d 1180, 1201 (7th Cir. 1988).

- - - - -

> Qualified immunity is intended to protect public officials from harassing litigation so that they "reasonably can anticipate when their conduct may give rise to liability for damages." Davis v. Scherer, 468 U.S. 183, 195 (1984). More specifically, qualified immunity protects government officials performing discretionary functions from liability for civil damages insofar as their conduct does not violate "clearly established" statutory or constitutional rights of which a reasonable person would have know. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

At page 408:

> From Anderson, we glean several guidelines concerning the level of generality afforded to "clearly established law" in the qualified immunity determination. Merely alleging a general violation of a right that may be clearly established by the constitution or a statute is insufficient clarity of established law to justify withholding qualified immunity. For example, an allegation that an action violates one's freedom of speech protected under the First Amendment is too general

> to strip a public official of qualified immunity. On the other hand, the "clearly established law" does not have to specifically correspond with every facet of the present situation. Rather, the "clearly established law" must be sufficiently analogous to the provide the public official with guidance as to the lawfulness of his or her conduct.

At page 409:

> Whether a public official may be protected by qualified immunity turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time the action was taken. Harlow, 457 U.S. at 818-19. If the law was not clearly established on the subject of the action when it occurred, then the public official cannot be held to know or anticipate that the conduct was unlawful. On the other hand, if the law was clearly established, then the immunity defense should fail because a reasonably competent public official should have know that the conduct was or was not lawful. (Emphasis added)
>
> The plaintiff bears the burden of establishing the existence of the allegedly "clearly

> established" constitutional right. (Cits. omitted)

That public employees have constitutional rights in the area of speech was clearly delineated in Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731:

> In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

We are also taught the rights are not absolute, thus from Note 3 in Pickering:

> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined. We intimate

> no views as to how we would resolve any specific instances of such situations, but merely note that significantly different considerations would be involved in such cases.

This the is Wisconsin Supreme Court in Barnhill (Op. cit.) at pages 410-411 held:

> Pickering and the aforementioned cases suggest that certain factors may be sufficient to limit what a public employee may publicly disclose. These factors include:
>
> (1) the need to maintain discipline or harmony among co-workers;
> (2) the need for confidentiality;
> (3) the manner, time, and place of the employee's speech;
> (4) the need to curtail conduct which impedes the employee's proper and competent performance of his daily duties;
> (5) the need to encourage a close and personal relationship between the employee and his superiors, where the relationship calls for loyalty and confidence; and
> (6) the context in which the speech occurred.

The plaintiff then argues in the balancing test this court is to perform

that (from page 42 of plaintiff's brief of October 29, 1992):

> In the present case, the clear, prevailing, and overriding public policy interest associated with information proffered by Mr. Reich is to ensure that a fair and equitable bidding process occurs when the University of Wisconsin personnel are involved in the decision making process, and to avoid the taint or appearance of impropriety by such personnel or the University. Additionally, since the taxpayers of Wisconsin subsidize the operation of the Whitewater Foundation [see Argument II(A)(2)], Mr. Reich's speech served an important public interest in ensuing that the least costly bidder be awarded the printing contract. As a secondary matter, in the present case, Mr. Reich's actions also directly served the interests of The Register and the contributors to the Foundation, all of whom are members of the general public, by promoting compliance with a bidding system designed to provide for reasonable printing costs and equal opportunity to bidders.

The defendants argue, however (pages 33-34, defendants' brief of September 28, 1992):

"Barnhill could have expressed his concerns without deliberately trying to damage and impair the operations, reputation, and business of WSRL." (Quoting Barnhill)

So it was with Reich. Once arrogating to himself the right to make a moral judgment for the entire university, he didn't just complain about it, he ventured into a course of conduct to obstruct it - even though Reich admits he couldn't find anything unlawful in the alleged practice.

Just as Barnhill went beyond legitimately exercising his rights when he tried to obstruct the defendants from exercising their rights, so Reich also went too far when he set about to so embarrass and humiliate Spellman in front of an important client, without warning, so that there would be no more of what Reich objected to. The right to criticize is not the right to sabotage.

Chancellor Connor had the right to include in the job description for the Assistant Chancellor for Public Relations substantial fund raising through the auspices of the alumni Foundation, to supplement sky-rocketing costs and dwindling appropriations by the

> legislature. Spellman had the right to solicit contributions. The alumni Foundation, a private non-profit corporation, had the right to condition its business, including the printing job in question, upon receiving a substantial contributions [sic] from those who sought its business. Reich may have had limited right to object to the university's involvement in this, but he had no right to covertly sabotage the system his superiors had set up.

As the Attorney General argued at the oral arguments, immunity is the rule, the plaintiff has the burden to show clearly a similar right. Further facts may be determined at a summary judgement motion which may be dispositive of the case and finally the doctrine of qualified immunity may well "protect the guilty".

The court finds then considering the factors set forth in Pickering: (1) The plaintiff has established no clear right; and (2) considering the employer's needs, the ambiguous nature of the employer's acts, the need for confidentiality when dealing with a supplier, the need for loyalty and confidence, the court finds for the defendants and grants their motion.

II

NOTICE

B

The defendants move for summary judgment, the claim brought under §895.65, Wis. Stats., for failure to timely file a

notice.

> §893.82(3) Except as provided in sub. (5m), no civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employe's or agent's duties...unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employe or agent involved. A specific denial by the attorney general is not a condition precedent to bringing the civil action or civil proceedings.

In light of Daily v. University of Wisconsin-Whitewater, 145 Wis. 2d 756 (Ct. App. 1988), the defendants cite also as operative the following, effective August 15, 1991, 1991 Act 39 §3579-3582:

> (2m) No claimant may bring an action against a state officer, employe or agent unless the

> claimant complies strictly with the requirements of this section.

It is not argued that notice need not be given within 120 days of the injury under §895.65. The issue as framed is, when did the injury occur?

The time frame is set forth in plaintiff's brief of October 29, 1992, thus:

> Dale Reich, the plaintiff, became Director of News and Publications at the University of Wisconsin-Whitewater in July, 1978. Mr. Reich served in this position for approximately eleven years.
>
> - - - - -
>
> In 1988 or 1989, when Ms. Wolt (Assistant Chancellor Wolt was plaintiff's immediate supervisor) resigned, Mr. Reich, upon the request of Chancellor Connor, assumed the position of Acting Assistant Chancellor of University Relations.
>
> - - - - -
>
> While serving in this limited appointment, Mr. Reich maintained a concurrent statutes as Academic Staff. Exhibit B. Under the §3.05 of the University's Academic Staff Personnel Policies and Procedures ("University Handbook"; Exhibit C), Mr. Reich's "limited appointment," meant that Mr. Reich served at

the pleasure of the official who made the appointment, in this case defendant and then-Chancellor James R. Connor.

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During the years 1990 and 1991, Assistant Chancellor Spellman and his office were engaged in fund raising efforts to fund a multi-purpose auditorium on the campus of the University of Wisconsin-Whitewater. During the course of these efforts, Mr. Spellman directed that The Whitewater Register (hereafter, "The Register"), a newspaper publication enterprise in the City of Whitewater, would be penalized with loss of University business because they did not make what Assistant Chancellor Spellman considered to be an "adequate" contribution to the fund raising campaign he was conducting. The Register was subsequently denied the opportunity to bid for the printing rights to the Whitewater Today, a paper funded by the University of Wisconsin-Whitewater Foundation (hereafter, "Whitewater Foundation") and produced by the News and Publications Department. Mr. Spellman contacted Mr. Reich, informed him of his directive that The Register would be penalized for failure to make an adequate contribution, and told the plaintiff that, if asked by any

one from The Register, he should tell them that the denial of the opportunity to bid was based solely on the poor quality of work that The Register had done in the past.

Mr. Reich was eventually asked by The Register why they were not allowed to bid, and he replied truthfully - that they had not, in Mr. Spellman's view, contributed enough to the auditorium project. Because he disclosed this information, Mr. Reich was reprimanded by Assistant Chancellor Spellman. Mr. Reich consequently met with Assistant Chancellor Spellman's supervisor, then-Chancellor Connor, who advised him that, regardless of his feelings about the propriety of Assistant Chancellor Spellman's actions, nonetheless, the plaintiff would be required to follow and obey the directions of Assistant Chancellor Spellman.

Feeling that, under the circumstances, he could no longer continue to work under the supervision of Assistant Chancellor Spellman, Mr. Reich attempted to resign his employment from the University. He was however persuaded at the time by then-Chancellor Connor to allow the Chancellor to secure alternative employment for him within the University.

> But instead of securing alternative employment, in January of 1991, Mr. Reich was told by Chancellor Connor that he would no longer be working for the University as of June 30, 1991. Then, in January of 1991, Assistant Chancellor Spellman reassigned Plaintiff to another office where he had substantially lesser job responsibilities than he had previously been responsible for. When Mr. Reich did not voluntarily leave the University on June 30, 1991, he was arbitrarily transferred from his job as Director of News and Publications Services to another department at the University at a substantially reduced salary and with substantially different job training requirements and responsibilities than he has as Director of News and Publications.

The plaintiff then argues compliance with §893.82(3) thus:

> Plaintiff complied with §893.82(3) when he filed his Notice of Claim on September 30, 1991, exactly sixty days after the event causing the injury, namely Mr. Reich's transfer, demotion, and reduction in pay. Further notice of claim was provided prior to the plaintiff's last day of work; accordingly, the requirements of

893.82(1) that the Attorney General have adequate time to investigate the claim and to provide the opportunity to the Attorney General to reach a compromise prior to a civil action were comported with. Additionally, Mr. Reich and his attorney corresponded and conversed on a number of occasions with the Chancellor of the University of Wisconsin System between January 31 and prior to July 2, 1991. Some of these discussion included the general counsel for the University of Wisconsin System. Following July 2, 1991, plaintiff and his attorney met to discuss possible alternative resolutions to the damages with the acting Chancellor and the general counsel.

The plaintiff received the following letter on University of Wisconsin-Whitewater letterhead dated January 31, 1991, from Chancellor James R. Connor:

Dear Dale:

At the time I received your letter of November 19, 1990 indicating your intention to resign from the University of Wisconsin-Whitewater on January 31, 1991, I stated that I thought you had acted in anger and haste and that you should allow me to try to find you another assignment at the

> University. I, therefore, took no action on your resignation at that time.
>
> As you now know, I have been unsuccessful in identifying a new assignment for you. . .
>
> It is, therefore, with great regret that I accept your resignation from the University of Wisconsin-Whitewater. It would seem appropriate for you to remain on the academic staff until June 30, 1991 instead of leaving the University on January 31st. This will give you the opportunity to seek alternative employment and also will give me added time to see whether there is an assignment here which would be attractive enough for you to continue here. As you know, I will also be leaving on June 30, and I do not think it fair to pass the problem of your job responsibilities to my successor. If you are agreeable to this extension of your resignation date, please let me know.

Defendants cite as a similar case Jicha v. DILHR, 169 Wis. 2d 284 (Sup. Ct. 1992):

> We now turn to the primary issue before us: whether Jicha failed to timely file his complaint alleging a violation of the

FMLA. The statute of limitations provision, sec. 103.10(12)(b), Stats., provides:

> An employe who believes his or her employer has violated sub. (11)(a) or (b) may, within 30 days after the violations occurs or the employe should reasonably have known that the violation occurred, whichever is later, file a complaint with the department alleging the violation.

Jicha sets forth two arguments to support his contention that the 30-day statute of limitations began to run on December 15, 1988, the day he received the letter refusing reinstatement. First, Jicha argues that Fort Howard's October 24 termination letter did not violate the FMLA because Fort Howard did not have sufficient notice of his medical condition at that time. Jicha posits that the violation did not occur until Fort Howard refused to reconsider its position after learning on Nov. 1, 1988, of the medical facts and circumstances surrounding Jicha's absence. We do not agree.

Generally, Wisconsin statutes of limitation employ language to the effect that a claim must be filed within a certain number of days or years after the cause of action accrues.

- - - - -

Our case law indicates that " 'a cause of action accrues where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it.' ". (Cits. omitted) In other words, a cause of action has accrued when all of the elements necessary to bring a cause of action have occurred.

- - - - -

Its existence (post-termination appeal process) did not change the fact that Jicha's employment was terminated on October 24, 1988, and it was not reasonable for Jicha to conclude otherwise. As the court of appeals reasoned:

> The questions . . . [in this case] concerns when Jicha reasonably knew of a violation, not whether he reasonably thought he would be reinstated. The violation occurred upon termination without regard to whether he was

> reinstated. The availability of the Open Door Policy procedure does not alter the fact that Jicha was discharged. The policy allows for presidential review 'after the discharge is effective.' The president may reinstate the employee if he believes the discharge was too severe. However, if the president agrees with the discharge decision, 'the employee remains discharged.' While the policy refers once to 'the period of suspension,' when read as a whole, the policy is intended as a post-termination procedure that occurs after the discharge is effective. Jicha, 164 Wis. 2d at 101 (emphasis in original).

We agree with this analysis. It was not reasonable for Jicha to conclude that Fort Howard's policy was anything other than an appeal process following a discharge. It also was not reasonable for him to believe that a violation of the FMLA did

> not occur until after the post-termination procedure. Jicha reasonably should have known that a violation occurred upon receipt of his termination letter on October 27, 1988.

Defendants then argue in their brief of October 29, 1992:

> Plaintiff Reich had an enforceable cause of action against known defendants as of January 31, 1991. He could have brought an action for injunctive or declaratory relief regarding his alleged involuntary termination immediately, with money damages for emotional distress, and compensatory damages as they accrued.

While plaintiff argues he was negotiating and discussing this matter with the University officials, it is my opinion that the triggering dated is January 31, 1991; and, therefore, no timely notice was given.

Defendants' motion for summary judgment is granted with costs.

Dated at Elkhorn, Wisconsin, this 28th day of April, 1993.

BY THE COURT:

/s/

John R. Race
Circuit Court

JRR:jas
cc: Atty. Russell W. Devitt
Asst. Atty. Gen. Michael J. Losse

STATE OF WISCONSIN CIRCUIT COURT WALWORTH COUNTY

DALE E. REICH,

Plaintiff,

vs.

AFFIDAVIT OF DALE E. REICH

MICHAEL SPELLMAN,
Assistant Chancellor,
University Relations,
University of Wisconsin-Whitewater,

Defendant,

Case No. 91 CV 747

JAMES R. CONNOR,
former Chancellor,
University of Wisconsin-Whitewater,

Defendant,

BOARD OF REGENTS of the University of Wisconsin System,

Defendant.

STATE OF WISCONSIN)
)SS
COUNTY OF WALWORTH)

Dale E. Reich being first duly sworn, deposes and says:

1. I served as Director of News and Publications Services at the University of Wisconsin-Whitewater for 13 years, from July 1, 1978 until July 1, 1991. During that time, I helped to develop and define

the mission of that unit. The primary mission of the unit was to serve as a liaison between the University and its various publics, including students, parents, alumni, University employees, the media, and others. An emphasis in the News and Publications Services mission statement, written by me and approved by Mr. Spellman, included honest and open communication with the members of the press.

2. My responsibility as Director of News and Publications Services was to lead my unit toward the successful completion of its mission statement (within all legal and ethical parameters). I functioned with great autonomy as Director of News and Publications Services during my tenure, including those years served under Mr. Spellman. This autonomy can be confirmed by other employees in the Office of News and Publications. It was my understanding that one of the major responsibilities of the position of Assistant Chancellor for University Relations, to which Chancellor Connor appointed me upon the resignation and departure of Mrs. Kay Woit, was to complete the fundraising for the proposed auditorium. At the time of my appointment, the University was approximately $200,000 short of its goal. I pursued that duty enthusiastically. However, when the Chancellor announced that state funding for the auditorium would fall short, and that another $3 million would be required, I withdrew my application for the permanent position within a week. I did not want to be employed in a position which the University was clearly defining almost

exclusively in fundraising terms. After Mr. Spellman arrived I returned to my permanent position as Director of News and Publications Services, as Chancellor Connor and I had agreed upon prior to my appointment as Acting Assistant Chancellor for University Relations.

3. The Assistant Chancellor for University Relations at University of Wisconsin-Whitewater also serves concurrently as the Executive Director of the University of Wisconsin-Whitewater Foundation.

4. During my years as Director of News and Publications Services I received annual raises and contract renewals. Many of my raises were large when compared to other academic staff at University of Wisconsin-Whitewater. During one of those years, when one-time funding became available, academic staff were invited to apply for raises in the amount of their choice. I received a LARGER RAISE than the one which I requested. To my knowledge, I was the only one of the more than 40 academic staff applicants to receive a larger raise than the one which he or she requested.

5. During the year beginning July 1, 1989 and ending July 1, 1990, I received three writing awards at the annual Universitiy of Wisconsin System Communicators Meeting, which was held at the University of Wisconsin-Whitewater. In addition, my unit submitted a second place entry in the category for effectively promoting "Design for Diversity." I was also honored with an

Outstanding Citizen Award by the Fairfield Grange of rural Whitewater. In 1990, 1991, and 1992 I was selected to serve as the opening speaker for Badger Boys State in Ripon, WI. Since 1988 I have also been honored by the Whitewater Police Department and the Vietnam Veterans of America (state chapter). To the best of my knowledge, no other University of Wisconsin System employee received more awards in the annual University of Wisconsin System Communicators awards program since its inception in 1985. Furthermore, members of the University of Wisconsin System University Relations Office stated on more than one occasion that the Office of News and Publications Services at the University of Wisconsin-Whitewater was the best unit of its kind in the 26-campus University of Wisconsin System.

6. My service to the University of Wisconsin-Whitewater went well beyond my duties as Director of News and Publications Services. I was asked, and sometimes even volunteered, to teach courses in the Communication Department. On occasion, I even taught these courses without financial remuneration. The chair of the Department said that my student-teacher evaluations placed me in the top 15% of instructors in the department. I also taught Elderhostel in the summer of 1990, and received the highest student ratings among the three instructors, including the winner of the Roseman Excellence in Teaching Award, given annually to the best teaching faculty member at the University of Wisconsin-Whitewater.

7. To the best of my knowledge, I received absolutely no written negative comments from either Chancellor Connor or Assistant Chancellor Kay Woit during the first 11 years of my tenure as Director of News and Publications Services. Both indicated a high level of approval and appreciation for my efforts.

8. Mr. Spellman assigned me the task of writing his fundraising proposals but, immediately after I received that assignment, my assistant, Julie Darling, volunteered to try writing the proposals. She continued to write under the direct supervision of Mr. Spellman. My alleged refusal to write proposals resulted in no reprimand by Mr. Spellman, written or otherwise.

9. During the meeting with Chancellor Connor and Mr. Spellman which immediately preceded my written resignation from the University of Wisconsin-Whitewater (dated Nov. 19, 1990), Mr. Connor told me four times that Mr. Spellman was my supervisor and that I had to do what Mr. Spellman wanted me to do. It was an indication to me that my objection to Mr. Spellman's fundraising tactics were being dismissed. Under extreme stress, I submitted my letter of resignation a few days later. It was a protest against unethical fundraising tactics and Mr. Connor's apparent approval of Mr. Spellman's actions.

10. The position which I was forced to assume on July 1, 1991 in the Office of Continuing Education Services was quite dissimilar to the ones for which I had

submitted letters of application at earlier dates. The new position, as indicated in the published advertisement, emphasized data management. I was neither interested in such work nor prepared to assume such duties. As a result, I did not submit an application for that position.

11. My forced separation from the Office of News and Publications Services was an extremely difficult and emotional experience for me. I had served the University for nearly 20 years, beginning as a student editor. That loyalty continued when I graduated and became an editor at the Whitewater Register. I played a leading role in helping the University to save its graduate school in 1974. In fact, I was honored by the Wisconsin Newspaper Association that year for my efforts. I also graduated twice from the University of Wisconsin-Whitewater, served as an instructor in the Communications Department, received an Outstanding Young Alumnus Award from UW-Whitewater in 1977, and provided positive leadership on many fronts. Example: I was the only academic staff employee to serve on the committee which the Faculty Senate constituted in the mid-1980's to fight a zero percent pay increase. I was later honored by the Faculty Senate for my service. These years of loyal and dedicated service, spanning nearly one-half of my lifetime, came to an abrupt halt when I was separated from my position on June 30, 1991. In addition, the months preceding that separation were filled with intense emotional strain, brought on by Mr. Spellman's actions, including his

fundraising schemes and his attempts to manipulate and manage the news emanating from our campus. I sought help from the University of Wisconsin-Whitewater Health Center to combat my extreme emotional stress, and was advised by Dr. Lee Rexroat to see a counselor off-campus. He suggested Dr. Fred Gustafson, Watertown, whom I then saw over the course of several months. The strain brought on by my change of circumstances at the University of Wisconsin-Whitewater was extreme. I felt as though the University was purposely punishing and humiliating me in an effort to get me to resign. I suffered significant financial loss. I was certain that my career at the University of Wisconsin-Whitewater, as well as my career as a public information officer under any other circumstances, had been destroyed. Further, I felt the emotional stress of being demoted and punished for having done what was right and honest for the University, its students and alumni, parents, and the public at large. I became unable to complete a full work week in the Office of Continuing Education and Outreach without taking a sick day in the middle of each week to fight the overwhelming stress, and to go through a period of emotional recuperation.

12. It should be noted that while I was unhappy with the quality of printing which the Whitewater Register was doing on "Whitewater Today," it was not the reason why they lost their right to bid and receive a contract. The reason was Mr. Spellman's order to me that the Register be excluded from the chance to obtain further printing business from the

University in light of their unwillingness to give sufficiently to the auditorium campaign.

13. The defendants' claim that that "at least part of his motivation was to be disruptive by embarrassing his supervisor, Spellman" is NOT TRUE. I simply responded honestly to Mr. Coe's query with respect to the status of the printing contract for WHITEWATER TODAY. I went along with Mr. Spellman's unethical secret for many months, and I regret that. I was finally moved to depart from the conspiracy by the direct question of Mr. Coe. It was a spontaneous, unplanned action which I knew might put me at great jeopardy, but which I needed to do in order to separate myself from dishonest and unethical actions.

14. The defendant's claim that my case engendered virtually no interest among the media is also not true. The Janesville Gazette called me and asked for details, and then published a story on my case. A second story, which followed the filing of this suit, was not only carried by the Gazette but picked up for statewide distribution by the Associated Press. I continue to get queries from the press and from many individuals concerning the status of my lawsuit.

15. The defendants' statement that I admitted that office harmony was "shattered" is false. I said only that office morale had been negatively affected, not that it was "shattered." Further, I was referring to Mr. Spellman's actions as the cause of the decline in morale, not my own.

16. With regard to the abuse of trust and a higher duty of loyalty that the defendant alleges, my highest duty was to tell the truth, and to properly serve the citizens of the State of Wisconsin. It was Mr. Spellman who was abusing the high level of trust placed in him.

Dated this 29th day of October, 1992.

/s/_____
Dale E. Reich

Subscribed and sworn to before me
this 29th day of October, 1992.

/s/_____
David P. Honan, Notary Public
Walworth County, Wisconsin

My commission is permanent.

STATE OF WISCONSIN CIRCUIT COURT
WALWORTH COUNTY CASE NO. 91 CV 747

DALE E. REICH,

Plaintiff,

vs.

MICHAEL SPELLMAN, Assistant Chancellor, University Relations, University of Wisconsin-Whitewater,

Defendant,

JAMES R. CONNOR, former Chancellor, University of Wisconsin-Whitewater,

Defendant,

BOARD OF REGENTS of the University of Wisconsin System,

Defendant.

SECOND AFFIDAVIT OF DALE E. REICH

[FILE STAMPED DEC. 22, 1993]

STATE OF WISCONSIN)
)SS
COUNTY OF WALWORTH)

Dale E. Reich being first duly sworn, deposes and says as follows:

1. I am the plaintiff in the above and foregoing action and make this affidavit for the purpose of establishing certain facts and in opposition to defendants' motion for summary judgment.

2. For many years I had been the Director of News and Publications for the University of Wisconsin-Whitewater; in the course of that occupation in 1990 and while in the course of fundraising

activities to fund the proposed new Whitewater Multi-Purpose Auditorium Project, Assistant Chancellor Spellman told me that The Whitewater Register (hereafter, The Register), a local newspaper and publishing business in the City of Whitewater, who had regularly printed the "Whitewater Today" publication, would not be allowed to bid on the upcoming issue of "Whitewater Today" because the owners of The Register made what Assistant Chancellor Spellman felt was an inadequate contribution to the auditorium fundraising project; Mr. Spellman indicated to me that if I was asked why The Register should not be allowed to bid that I should respond that the reason was because of poor printing quality in a prior issue of "Whitewater Today" but that I should not indicate that it was because he felt the owners of The Register had made an inadequate contribution to the fundraising campaign.

3. In the fall of 1990 a representative of The Register called me at the University and asked why they had not been given the opportunity to bid on the "Whitewater Today" above referred to. At first I indicated that the reason was poor printing quality as directed by Mr. Spellman. I then, after discontinuing my conversation with the representative of The Register, called the representative back on telephone and told him that in truth the reason they were not allowed to bid was because they had made an inadequate contribution to the fundraising project for the new projected multi-use auditorium; soon there after a meeting was held between Mr. Spellman and the owner of The Register and following that I was reprimanded by Mr. Spellman first orally and then in writing for having disclosed to The Register the truthful reason why they were not allowed to bid on the "Whitewater Today" issue.

4. While I agreed with Mr. Spellman that the printing quality of the prior issue of the "Whitewater Today" was not satisfactory and that such unsatisfactory printing quality would have been a legitimate reason to change printers, I

strongly disagreed that business should be taken away from The Register because of an inadequate contribution to the University fundraising campaign; regrettably I went along with Chancellor Spellman until I was confronted by The Register and then was compelled by my own feelings to disclose to The Register, when asked, the real reason why it had not been allowed to bid.

5. After being reprimanded by Mr. Spellman I met with Mr. Spellman and his supervisor, then Chancellor James Connor, who advised me that, regardless of my feelings about the propriety of Mr. Spellman's actions, I would nevertheless be required to follow and obey the directions of Mr. Spellman.

6. I felt and believed at that time that Mr. Spellman's actions and fundraising techniques represented an ethical breach and mismanagement and an abuse of authority, could possibly result in a substantial waste of public money, and were coercive and may have constituted extortion:

a. I recalled that on at least one occasion when then-Chancellor Connor, prior to Mr. Spellman's directive to me to not disclose the real reason for The Register failing to be allowed to bid, had indicated that no coercion should be used to solicit contributions to the Campaign and then if someone failed to give, nothing further should be said or done;

b. I was and am concerned that Mr. Spellman's actions might have constituted extortion because it appeared to me to be a deliberate attempt to force The Register to reconsider its contribution if it wanted to continue to receive consideration in the bidding process, and it bothered me and does bother me that Mr. Spellman's actions meant that if The Register had given an adequate contribution, then the printing quality problems, which was ostensively the reason for their loss of business, would not have mattered;

d. I believed that his policy was

also probably contrary to state printing regulations, which allows all qualified printers to submit bids on specific contracts (The Register was excluded from bidding based on the insufficiency of their contribution rather than their failure to meet state specifications).

e. This did not seem to be a wise use of public funds, which I believed are used in support of the printing of the Whitewater Today, since the sufficiency of contribution rather than lowest-cost bidder appeared to be the approved University policy for assigning printing bids.

f. I also felt that I had been essentially told to lie about the reason why The Register would not be allowed to bid on the issue of The Register;

g. Although my sense of professionally ethics were enhanced by occassional professional articles, discussing ethical guidelines, considerations, and issues, and by a course on journalism law and ethics that I taught at the University, it did not take this background to sensitize me to the ethical problems associated with Mr. Spellman's actions toward The Register or with he request that I lie for him;

h. I consequently also felt that Chancellor Connor's order to follow and participate Mr. Spellman's unethical tactics represented an abuse of authority and mismanagement and a potential waste of public funds;

7. As a result of my concerns I felt that I could no longer work under the supervision of Mr. Spellman and I attempted to resign from the University by submitting a written notice to that affect on November 19, 1990; immediately following that, then Chancellor Connor persuaded me to withdraw my resignation and Chancellor Connor advised me that he would secure comparable alternative employment for me within the University where I would not be under the supervision of Mr. Spellman.

8. My letter of resignation to the University indicated that it would effective January 31, 1991; on January 31, 1991, I received a memo from Chancellor Connor (attached Exhibit A); this appeared to me to be an indication that I should retain my position until June 30, 1991, and that Chancellor Connor would seek comparable additional employment for me; I did not believe that this letter represented an accurate statement of the facts since I had in fact allowed Chancellor Connor to persuade me to not resign.

9. In response to Chancellor Connor's January threat of termination, I submitted a memo to Chancellor Connor (exhibit B), (accidentally dated February 22, "1990," it should have been dated "1991") indicating that I did not consider his correspondence to be an accurate representation of the facts since in fact I had not at that point resigned having been persuaded to withdraw same and advising him that I expected that he would find me comparable alternative employment within the University; in response, I received a memo from Chancellor Connor reiterrating his January 31 memo (Exhibit C).

10. I subsequently received a memo from Mr. Spellman spelling out my responsibities in News and Publications through June 30, 1991 (Exhibit D).

11. As a result of receiving these documents and while I continued to be titled Director of News and Publications and receive the salary of News and Publications Director, I consulted with my attorney who directed correspondence to Chancellor Connor dated April 2, 1991, a copy of which is attached hereto (Exhibit E).

12. Chancellor Connor's response, dated April 8, 1991, merely reiterated the University's position. Exhibit F.

13. In response to this communication my attorney drafted and directed to then Chancellor Connor

correspondence dated May 7, 1991. Exhibit G.

14. Then, in a memo dated June 18, 1991 (exhibit H), Chancellor Connor wrote to "offer" me the job as Outreach Program Specialist; because the letter indicated when I "will be assigned," and indicated an effective date of the transfer, I did not view the communication as a real offer; also, though the memo did indicate that Chancellor Connor was, as indicated in his January 31 memo, seeking to find other employment for me, Chancellor Connor had indicated that any such position would be "attractive enough [to me]" (exhibit A), meaning comparable in salary and level of authority; because I did not want to accept the offer, which would have reduced my salary by approximately $15,000.00, I did not sign the contract that was enclosed with Chancellor Connor's memo.

15. On or about July 1, 1990, I received a phone call at my home from then Chancellor H. Gaylon Greenhill. Mr. Greenhill informed me that I was to report of the office of Continuing Education and Outreach to assume a new position that of outreach specialist. I advise Chancellor Connor that I had not asked for such an assignment change, and I also asked him if I did not report to Continuing Education that I no longer would be employed at the University of Wisconsin-Whitewater and he replied "yes". I made no further indication to Mr. Greenhill regarding my intentions.

16. On or about July 2, I received a memo from Chancellor Greenhill (exhibit I) which made effective my involuntary reassignment to the Outreach Program Specialist position in the office of Continuing Education and Outreach at a salary approximately $15,000.00 less than I was then earning; I considered this to be a demotion and transfer because of my prior disclosure of information to The Register as to the truthful reason they were not allowed to bid on the issue of the "Whitewater Today" referred to above.

17. Because of the transfer,

demotion and what I felt to be undue punishment for disclosing the information disclosed for what I thought to be good and valid reasons which I set forth above, I began to experience intense pressure and emotional strain and as a result I found it necessary to obtain psychological treatment and counseling.

18. Because of the strain and emotional pressure I felt at having been punished by virtue of this transfer and demotion, I resigned my employment from the University on October 8, 1991; resignation was to be effective October 31, 1991. Exhibit J.

19. I felt at the time of my resignation, and still feel, that I was demoted, transferred, and punished for having told the truth to The Register about actions I felt to be ethically and possibly legally wrong in any setting and most certainly in state government.

Dated this 21st day of December, 1992.

/s/

Dale E. Reich

Subscribed to and sworn to before me this 21st day of December, 1992.

/s/

David P. Honan, Notary Public
Walworth County
My commission is permanent.

LIST OF ATTACHED EXHIBITS

Exhibit A: Memo from Chancellor Connor to Dale Reich, dated January 31, 1991 (Threatening Mr. Reich with Termination)

Exhibit B: Memo From Dale Reich to Chancellor Connor, dated February 22, 199(1) (Responding to Threat of Termination)

Exhibit C: Memo from Chancellor Connor to Dale Reich, dated February 27, 1991 (Reiterating Connor's January 31, 1991 Memo)

Exhibit D: Memo from Mr. Spellman, dated March 11, 1991 (Spelling out Mr. Reich's Responsibilities in News and Publications through June 30, 1991)

Exhibit E: Letter From Plaintiff's Attorney Devitt to Chancellor Connor, dated April 2, 1991.

Exhibit F: Chancellor Connor's Initial Response to Attorney Devitt, dated April 8, 1991.

Exhibit G: Second Letter From Attorney Devitt to Chancellor Connor, dated May 7, 1991.

Exhibit H: Memo from Chancellor Connor to Dale Reich, dated June 18, 1991.

Exhibit I: Memo from Chancellor Greenhill, dated July 2, 1991 (Confirming Mr. Reich's Transfer)

***Exhibit J:** Memo from Dale Reich to Dr. McLeRoy, dated october 8, 1991 (Resigning from the University, effective October 31, 1991)

***Exhibit K:** "Ethical Principles" Published by the National Society of Fund Raising Executives

***Exhibit L:** Memo from chancellor Connor, dated January 3, 1989 (Requesting a Transfer of Funds from the Foundation to the University)

***Exhibit M:** Foundation Telephone Listing and Invitation To Foundation Event (with a University return Address)

***Exhibit N:** Information Relating to Sources of Defendant Spellman's Income

***Exhibit O:** "Lease Between University and the Foundation (For On-Campus Housing of the Foundation)

***Exhibit P:** Letter from Chancellor H. Gaylon Greenhill, dated December 3, 1992 (in response to "Access To Records" request).

***Exhibit Q:** Article The Janesville Gazette, Friday November 22, 1991, (Including and Interview With Defendant Spellman)

*Filed in Circuit Court, but not attached to this Petition.

Exhibit A: Memo from Chancellor Connor to Dale Reich, dated January 31, 1991 (Threatening Mr. Reich with Termination)

UNIVERSITY OF WISCONSIN-WHITEWATER
800 West Main Street, Whitewater
Wisconsin 53190-1790
Office of the Chancellor

January 31, 1991

Mr. Dale Reich, Director
News & Publications
University of Wisconsin-Whitewater
Whitewater, WI 53190

Dear Dale:

At the time I received your letter of November 19, 1990 indicating your intention to resign from the University of Wisconsin-Whitewater on January 31, 1991, I stated that I thought you had acted in anger and haste and that you should allow me to try to find you another assignment at the University. I, therefore, took no action on your resignation at that time.

As you now know, I have been unsuccessful in identifying a new assignment for you. The discussion with Dean Barnett has indicated that because you lack three years of experience as a public school teacher you cannot supervise student teachers. There is the possibility of a one-quarter time temporary assignment in Observation and Participation and in working on the announcements of the new master's degree programs.

It is, therefore, with great regret that I accept your resignation from the University of Wisconsin-Whitewater. It would seem appropriate for you to remain on the academic staff until June 30, 1991 instead of leaving the University on January 31st. This will give you the opportunity to seek alternative employment and also will give me added time to see

whether there is an assignment here which would be attractive enough for you to continue here. As you know, I will also be leaving on June 30, and I do not think it fair to pass the problem of your job responsibilities to my successor. If you are agreeable to this extension of your resignation date, please let me know.

I regret very much having to accept your resignation when I encouraged you to withdraw it. I did not realize how difficult it would be to move you elsewhere for reasons which have been shared with you. Under these circumstances I want to provide you with ample time to make decisions about your future and also feel you out to have time beyond that which you indicated in your letter of resignation.

Nothing which has been said above in any way alters my high regard for you as a person and as a professional. I was hopeful from the very beginning that whatever problems which had arisen between you and Mr. Spellman might have been resolved. I did my best to make this happen, but it proved to be impossible.

Thank you for your more than a decade of service to the University of Wisconsin-Whitewater. I am sure that you know I wish you well for the future.

Cordially yours,
/s/
James R. Connor
Chancellor

Exhibit B: Memo From Dale Reich to Chancellor Connor, dated February 22, 199(1) (Responding to Threat of Termination)

RECEIVED
February 25 1991
CHANCELLORS OFFICE

February 22, 1990

TO: Chancellor James R. Connor

FROM: Dale Reich [initialed]

SUBJECT: Employment Status

I have received your letter of January 31, 1991 indicating that I am welcome to remain at UW-Whitewater until July 1, 1991.

As you will recall, you indicated to me at our meeting in December that you were going to reject and destroy my letter of resignation. I indicated to you that I consented to that action, and would accept your offer to find me an alternate position on campus.

As a result of that conversation, I do not consider the letter of resignation to be in effect. I continue to wait for my transfer to another office or unit on the UW-Whitewater campus.

In the meantime, I am accepting and completing assignments from my new office in Hyer 2.

Exhibit C: Memo from Chancellor Connor to Dale Reich, dated February 27, 1991 (Reiterating Connor's January 31, 1991 Memo)

UNIVERSITY OF WISCONSIN-WHITEWATER
800 West Main Street, Whitewater
Wisconsin 53190-1790
Office of the Chancellor

February 27, 1991

Mr. Dale Reich
University of Wisconsin-Whitewater
Whitewater, WI 53190

Dear Dale:

In response to your memorandum of February 22, 1991, "Employment Status," I would refer you to my letter of January 31, 1991. Your "employment status" is spelled out in that letter to you.

Sincerely yours,
/S/
James R. Connor
Chancellor

JRC/mw

Exhibit D: Memo from Mr. Spellman, dated March 11, 1991 (Spelling out Mr. Reich's Responsibilities in News and Publications through June 30, 1991)

RECEIVED
MAR 15 1991
Chancellor's Office

M E M O R A N D U M

TO Dale Reich

FROM Mike Spellman [initialed]

RE Work responsibilities through June 30, 1991

DATE 11 March 1991

Thank you for meeting with me regarding your work responsibilities now through June 30th. We agreed on the following responsibilities for your to accomplish:

1. Write graduation and honor roll releases.

2. Write cultural affairs press releases.

3. Write pre-events, special event and award releases.

4. Write Whitewater footnotes spots.

5. Work quarter time for the College of Education doing brochures and press releases.

The News and Publications office will be responsible for doing the actual mailings once you complete the writing of these releases.

Thank you for your assistance and

cooperation.

MCS:jmf

cc: Chancellor Connor
Vice Chancellor Gaylon Greenhill
Dean Barnett
Julie Darling

Exhibit E: Letter From Plaintiff's Attorney Devitt to Chancellor Connor, dated April 2, 1991.

APR 5 1991
CHANCELLOR'S OFFICE

SOFFA & DEVITT
ATTORNEYS AT LAW

332 W. WHITEWATER ST.
WHITEWATER, WISCONSIN 53190
SAM J. SOFFA AREA CODE 414
RUSSELL W. DEVITT TELEPHONE 473-5105

April 2, 1991

Chancellor James R. Connor
University of Wisconsin - Whitewater
800 West Main Street
Whitewater, WI 53190-1790

Re: Dale Reich

Dear Chancellor Connor:

Please be advised that Dale Reich has asked that I review certain actions which have occurred with respect to his employment status at the University of Wisconsin - Whitewater.

From the information provided, it appears that Mr. Reich enjoys indefinite status as an academic staff member and was appointed by you as Director of News and Publications.

It appears that a substantial redefinition of his duties and/or title has occurred without there having been any prior written notice to Mr. Reich or opportunity to respond to that. I am further concerned that it appears that Mr. Reich may have been penalized as a result of disclosing information relative to improper fundraising techniques which, in my opinion, would violate Mr. Reich's

legally protected rights.

The purpose of this correspondence is to bring these matters to your attention in an attempt to resolve the problems prior to the necessity of any further legal action. Please advise in the very near future any further clarification you feel is required so that I might be able to further advise Mr. Reich on these issues.

Thank you for your attention in this matter.

Very truly yours,

SOFFA & DEVITT
/s/
Russell W. Devitt

RWD:kk
cc: Dale Reich

Exhibit F: Chancellor Connor's Initial Response to Attorney Devitt, dated April 8, 1991.

UNIVERSITY OF WISCONSIN-WHITEWATER
800 West Main Street, Whitewater
Wisconsin 53190-1790
Office of the Chancellor

April 8, 1991

Mr. Russell W. Devitt
Soffa & Devitt Attorneys at Law
332 W. Whitewater Street
Whitewater, WI 53190

Dear Mr. Devitt:

I am responding to your letter of April 2, 1991 concerning Mr. Dale Reich, a member of the academic staff at the University of Wisconsin-Whitewater until June 30, 1991.

As you are undoubtedly aware, Mr. Reich voluntarily tendered his resignation as an indefinite appointee of the academic staff at this institution on November 19, 1990. His resignation was to be effective January 31, 1991.

On January 31, 1991, I wrote to Mr. Reich, accepting his resignation but asking him to remain until June 30, 1991. He thus continues on the University payroll until that date at which time he will leave his University employment.

In view of Mr. Reich's voluntary resignation as a member of the academic staff at this institution, I have no further comment on your letter of April 2.

Sincerely yours,
/s/
James R. Connor
Chancellor

JRC:mw
c: Mr. Dale Reich

Exhibit G: Second Letter From Attorney Chancellor Connor, dated May 7, 1991.

SOFFA & DEVITT
ATTORNEYS AT LAW

332 W. WHITEWATER ST.
WHITEWATER, WISCONSIN 53190
SAM J. SOFFA AREA CODE 414
RUSSELL W. DEVITT TELEPHONE 473-5105

May 7, 1991

Mr. James R. Connor, Chancellor
University of Wisconsin - Whitewater
800 West Main Street
Whitewater, WI 53190-1790

Re: Dale Reich:

Dear Chancellor Connor:

I previously directed correspondence to you detailing my concern with respect to Dale Reich's employment status. In response you indicated that he voluntarily resigned. Our position is that Dale's so called letter of "resignation" was in fact a protest over allegedly improper fund raising techniques of which, I believe, you have been made aware. In addition, it is our position that as Chancellor you requested that you be able to destroy Dale's letter of resignation, Dale consented, and thereafter it was considered by Dale to have been destroyed. Apparently, by the terms of your April 8 correspondence, the University is now considering that the "resignation" has been resurrected.

I have reviewed the Administrative Code provisions, the state statutes and the University of Wisconsin - Whitewater academic staff personnel policies and procedures. Since Dale continues to be

employed we do not consider that he has been terminated. If he is terminated it will be considered to be for unjust cause and will be pursued pursuant to the Administrative Code and personnel policies.

Generally it appears that Dale has the right to file a grievance. UWW Chapter 8 provides, in Dale's case, that if he goes through the grievance procedure, you as Chancellor will make the final decision. If we infer from the fact that you as Chancellor have already made a decision as to the various matters involving his employment status, then filing such a grievance may be a meaningless gesture and a waste of everyone's resources. If a grievance were filed pursuant to the grievance procedure, it would involve the following:

1. UWW Chapter 3.08 which provides that a significant change in existing conditions of appointment must be specified in writing at least 10 days prior to the change. This does not appear to have been followed in Dale's case as his conditions of appointment were substantially changed of January 31.

2. UWW Chapter 4.04 which provides that Dale must receive at least a six month notice that a fixed term appointment will not be renewed. As Director of News and Publications appears to be a fixed term appointment, (while "indefinite status academic staff" is not) it appears notice of termination of that appointment was not given six months in advance.

3. UWW Chapter 6, Dismissal of Academic Staff for cause. We would treat termination as dismissal for cause and UWW Chapter 6 must be observed. Of course, no charges have been filed nor has any opportunity for hearing been given. It appears a decision under UWW Chapter 6 is appealable to the Board of Regents and Dale would certainly like to avail himself of this appeal process and the opportunity to have a hearing.

With regard to the above, and to termination of indefinite status academic staff should that occur, it will be contended that Dale's right to free speech, his rights under the Wisconsin Statutes, including Section 895.65, his contract right to no discharge without just cause pursuant to Wisconsin Administrative Code Section UWS 11.01(1) and his state and federally protected rights to due process and equal protection have been violated.

If you have not made your final decision as Chancellor with respect to the above matters, I would appreciate it if you would provide a copy of this correspondence to Mr. Spellman, Mr. Reich's immediate supervisor, and ask that Mr. Spellman provide a response pursuant to UWW 8.05. If, on the other hand, the final decision has been made and thus the grievance procedure would be a useless gesture, we will proceed with appropriate Court action to enforce Dale's rights.

Please consider this and advise as to your conclusion regarding the grievance procedure so that we may take such further

action as may be appropriate.

Thank you for your attention in these matters.

Very truly yours,

SOFFA & DEVITT

/s/
Russell W. Devitt

RWD:kk

cc: Dale Reich

Exhibit H: Memo from Chancellor Connor to Dale Reich, dated June 18, 1991.

UNIVERSITY OF WISCONSIN-WHITEWATER
800 West Main Street, Whitewater,
Wisconsin 53190-1790
Office of the Chancellor

June 18, 1991

Mr. Dale Reich
N358 North Oak Clay Drive
Whitewater, WI 53190

Dear Mr. Reich:

I am writing to offer you the position of Outreach Program Specialist, for which you previously applied, effective July 1, 1991. You will be assigned to the Division of Continuing Education and Outreach with duties as indicated in the attached position description. The salary range for this position is Pay Range 4 from $23,996 to $35,995. Your salary will be $35,995 on an annual basis, payable in twelve installments.

As you know, your title as Director of News and Publications was a limited appointment in which you served at the pleasure of the appointing authority. That appointment was terminated with your resignation as of January 31, 1991. The University will make the position of Outreach Program Specialist available to you, and you should plan to report to Dean Thomas S. McLeRoy in Roseman 2013 on July 1st. While your limited appointment as Director has been terminated, you will retain your indefinite status as a member of the Academic Staff.

A contract for your to sign is enclosed. Please return it to my office

at your earliest convenience.

Sincerely yours,

/s/
James R. Connor
Chancellor

JRC:mw

Enclosure

c: Chancellor-Designate Greenhill
Dean Thomas S. McLeRoy

bc: Charles Stathas

UNIVERSITY OF WISCONSIN-WHITEWATER

ACADEMIC STAFF PROBATIONARY APPOINTMENT

DALE E. REICH
First Name Middle Initial Last Name

is hereby appointed as

Outreach Program Specialist of
Title

Continuing Education, Extension & Summer Session
Department or Area

The contractual period for this appointment is July 1, 1991

through June 30, 1992.

Appointment Basis:

Social Security No.: 387-48-9350

___ Academic Year

_X_ Annual

___ Contingency: _____

Date of Birth: 5/5/47

Base Salary: $35,995

Percent of Time: 100%

Contract of Salary: $35,995

Pursuant to University of Wisconsin-

Whitewater Academic Staff Personnel Rules, Section 3.03, the maximum probationary period will be _____ years and the decision on indefinite status is scheduled for Indefinite.

Degree Date Institution

B.A. 1972 University of Wisconsin - Whitewater, Whitewater, WI

M.A.T. 1977 University of Wisconsin - Whitewater, Whitewater, WI

ACCEPTED: _____ _____
(Date) (Signature)

APPROVED: _____ _____
(Date) (Signature,Chancellor)

PLEASE RETURN THIS CONTRACT WITHIN TWO WEEKS AFTER RECEIPT

Exhibit I: Memo from Chancellor Greenhill, dated July 2, 1991 (Confirming Mr. Reich's Transfer)

TO: Betty Murray, Payroll
and Benefits Manager

FROM: H. Gaylon Greenhill /s/

DATE: July 2, 1991

RE: Dale Reich

Effective July 1, 1991, Dale Reich is assigned as Outreach Program Specialist (S92-D-N-04) in the Office of Continuing Education and Outreach at a salary rate of $35,995 on an annual, twelve month, basis. His indefinite status in the Academic Staff is as Outreach Program Specialist, Pay Grade 4.

HGG:mys

cc: Dale Reich
Charles Stathas
Russell Devitt
Tom McLeRoy
Dick Lee
Randy Marnocha
Rose Grandt

AMENDMENTS TO THE UNITED STATES CONSTITUTION

FIRST AMENDMENT TO UNITED STATES CONSTITUTION

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT

ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USCS § 1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

893.80 **Claims against governmental bodies or officers, agents or employee; notice of injury; limitation of damages and suits.** **(1)** Except as provided in subs. (1m) and (1p), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employe of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employe under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employe; and

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is

disallowed. Failure of the appropriate body to disallow within 120 days after presentation is a disallowance. Notice of disallowance shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. No action on a claim against any defendant, fire company, corporation, subdivision or agency nor against any defendant officer, official, agent or employe, may be brought after 6 months from the date of service of the notice, and the notice shall contain a statement to that effect.

(1m) With regard to a claim to recover damages for medical malpractice, the time period under sub. (1) (a) shall be 180 days after discovery of the injury or the date on which, in the exercise of reasonable diligence, the injury should have been discovered, rather then a 120 days after the happening of the event giving rise to the claim.

(1p) No action may be brought or maintained with regard to a claim to recover damages against any political corporation, governmental subdivision or agency thereof for the negligent inspection of any property, premises, place of employment or construction site for the violation of any statute rule, ordinance or health and safety code unless the alleged negligent act or omission occurred after November 30, 1976. In any such action, the time period under sub. (1) (a) shall be one year after discovery of the negligent act or omission or the date on which, in the exercise of reasonable diligence the negligent act or omission should have been discovered.

(1t) Only one action for property damage may be brought under sub. (1p) by 2 or more joint tenants of a single-family dwelling.

(2) The claimant may accept payment of a portion of the claim without waiving the right to recover the balance. No interest may be recovered on any portion of a claim after an order is drawn and made available to the claimant. If in an actio the claimant recovers a greater sum than was allowed, the claimant shall recover costs, otherwise the defendant shall recover costs.

(3) The amount recoverable by any person for any damages, injuries or death in any action founded on tort against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof and against their officers, officials, agents or employes for acts done in their official capacity or in the course of their agency or employment, whether proceeded against jointly or severally, shall not exceed $50,000, except that the amount recoverable shall not exceed $25,000 in any such action against a volunteer fire company organized under ch. 213 or its officers, officials, agents or employes. If the volunteer fire company is part of a combined fire department, the $25,000 limit still applies to actions against the volunteer fire company or its officers, officials, agents or employes. No punitive damages may be allowed or recoverable in any such action under this subsection.

(4) No suit may be brought against any volunteer fire company organized under ch. 213, political corporation,

governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employes nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

(5) Except as provided in this subsection, the provisions and limitation of this section shall be exclusive and shall apply to all claims against a volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency or against any officer, official, agent or employ thereof for acts done in an official capacity or the course of his or her agency or employment. When rights or remedies are provided by any other statute against any political corporation, governmental subdivision or agency or any officer, official, agent or employe thereof for injury, damage or death, such statute shall apply and the limitations in sub. (3) shall be inapplicable.

(6) A 1st class city, its officers, officials, agents or employes shall not be liable for any claim for damages to person or property arising out of any act or omission in providing or failing to provide police services upon the interstate freeway system or in or upon any grounds, building or other improvement owned by a county and designated for stadium or airport purposes and appurtenant uses.

893.82 Claims against state employes; notice of claim; limitation of damages. **(1)**(a) The purposes of this section are

1. Provide the attorney general with adequate time to investigate claims which might result in judgments to be paid by the state.

2. Provide the attorney general with any opportunity to effect a compromise without a civil action or civil proceeding.

3. Place a limit on the amounts recoverable in civil actions or civil proceedings against any state officer, employe or agent.

(b) The provisions of section shall be liberally construed to effectuate this intent.

(2) In this section:

(a) "Civil action or civil proceeding" includes a civil action or civil proceeding commenced or continued by counter-claim, cross claim or 3rd-party complaint.

(b) "Claimant" means the person or entity sustaining the damage or injury or his or her agent, attorney or personal representative.

(c) "Damage" or "injury" means any damage or injury of any nature which is caused or allegedly caused by the event. "Damage" or "injury" includes, but is not limited to, any physical or mental damage or injury or financial damage or injury resulting from claims for contribution or indemnification.

(d) "State officer, employe or agent" includes any of the following persons:

1. An officer, employe or agent of any nonprofit corporation operating a

museum under a lease agreement with the state historical society.

1m. A volunteer health care provider who provides services under s. 146.89.

2. A member of a local emergency planning committee appointed by a county board under s. 59.07 (146) (a).

3. A member of the board of governors created under s. 619.04 (3), a member of a committee or subcommittee of that board of governors, a member of the patients compensation fund peer review council created under s. 655.275 (2) and a person consulting with that council under s. 655.275 (5) (b).

(3) Except as provided in sub. (5m), no civil action or civil proceeding may be brought against any state officer, employe or agent for or on account of any act growing out of or committed in the course of the discharge of the officer's, employe's or agent's duties, and no civil action or civil proceeding may be brought against any nonprofit corporation operating a museum under a lease agreement with the state historical society, unless within 120 days of the event causing the injury, damage or death giving rise to the civil action or civil proceeding, the claimant in the action or proceeding serves upon the attorney general written notice of a claim stating the time, date, location and the circumstances of the event giving rise to the claim for the injury, damage or death and the names of persons involved, including the name of the state officer, employe or agent involved. A specific denial by the attorney general is not a condition precedent to bringing the civil action or proceeding.

(4) (a) Except as provided in par. (b), if the civil action or proceeding under sub. (3) is based on contribution or indemnification, the event under sub. (3) is the underlying cause of action, not the cause of action for contribution or indemnification, and, except as provided in sub. (5m), the 120-day limitation applies to that event.

(b) 1. If the claimant under par. (a) establishes that he or she had no actual or constructive knowledge of the underlying cause of action at the time of the event under sub. (3), except as provided in sub. (5m), the 120-day limitation under sub. (3) applies to the earlier of the following:

a. The date the cause of action for contribution or indemnification accrues.

b. The date the claimant acquired actual or constructive knowledge of the underlying cause of action.

2. The claimant has the burden of proving he or she had no actual knowledge of the underlying cause of action under this paragraph.

(5) The notice under sub. (3) shall be sworn to by the claimant and shall be served upon the attorney general at his or her office in the capitol by certified mail. Notice shall be considered to be given upon mailing for the purpose of computing the time of giving notice.

(5m) With regard to a claim to recover damages for medical malpractice, the time periods under subs. (3) and (4) shall be 180 days after discovery of the injury or the date on which, in the exercise of reasonable diligence, the injury should have been discovered, rather than 120 days after the event causing the

injury.

(6) The amount recoverable by any person or entity for any damages, injuries or death in any civil action or civil proceeding against a state officer, employe or agent, or against a nonprofit corporation operating a museum under a lease agreement with the state historical society, including any such action or proceeding based on contribution or indemnification, shall not exceed $250,000. No punitive damages may be allowed or recoverable in any such action.

(7) With respect to a state officer, employe or agent described in sub. (2) (d) 3, this section applies to an event causing the injury, damage or death giving rise to an action against the state officer, employe or agent, which occurs before, on or after April 25, 1990.

895.65 Government employer retaliation prohibited. (1) In this section:

(a) "Disciplinary action" means any action taken with respect to an employe which has the effect, in whole or in part, of a penalty.

(b) "Employe" means any person employed by any governmental unit except:

1. A person employed by the office of the governor, the courts, the legislature or a service agency under subch. IV of ch. 13.

2. A person who is, or whose immediate supervisor is, assigned to an executive salary group under s. 20.923.

(c) "Governmental unit" means any association, authority, board, commission, department, independent agency, institution, office, society or other body in state government created or authorized

to be created by the constitution or any law, including the legislature, the office of the governor and the courts. "Governmental unit" does not mean any political subdivision of the state or body within one or more political subdivisions which is created by law or by action of one or more political subdivisions.

(d) "Information" means information gained by the employe which the employe reasonably believes demonstrates:

1. A violation of any state or federal law, rule or regulation.

2. Mismanagement or abuse of authority in state government, a substantial waste of public funds or a danger to public health and safety.

(2) An employe may bring an action in circuit court against his or her employer or employer's agent, including this state, if the employer or employer's agent retaliates, by engaging in a disciplinary action, against the employe because the employe exercised his or her rights under the first amendment to the U.S. constitution or article I, section 3, of the Wisconsin constitution by lawfully disclosing information or because the employer or employer's agent believes the employe so exercised his or her rights. The employe shall bring the action within 2 years after the action allegedly occurred or after the employe learned of the action, whichever occurs last. No employe may bring an action against the department of employment relations as an employer's agent.

(3) If, following the close of all evidence in an action under this section, a court or jury finds that retaliation was the primary factor in an employer's or

employer's agent's decision to engage in a disciplinary action, the court or jury may not consider any evidence offered by the employer or employer's agent that the employer or employer's agent would have engaged in the disciplinary action even if the employe had not disclosed, or the employer or employer's agent had not believed the employe disclosed, the information.

(4) If the court or jury finds that the employer or employer's agent retaliated against the employe, the court shall take any appropriate action, including but not limited to the following;

(a) Order placement of the employe in his or her previous position with or without back pay.

(b) Order transfer of the employe to an available position for which the employe is qualified within the same governmental unit.

(c) Order expungement of adverse material relating to the retaliatory action or threat from the employe's personnel file.

(cm) Order the employer to pay compensatory damages.

(d) Order the employer to pay the employe's reasonable attorney fees.

(e) Order the employer or employer's agent to insert a copy of the court order into the employe's personnel file.

(f) Recommend to the employer that disciplinary or other action be taken regarding he employer's agent, including but not limited to any of the following:

1. Placement of information describing the agent's action in his or her personnel file.

2. Issuance of a letter reprimanding the agent.
3. Suspension.
4. Termination.

The Janesville Gazette

Friday, November 22, 1991

"Paper refuses to donate, loses contract: Ex-employee"

By Stan Milam
Gazette Staff

WHITEWATER

MADISON - A former UW-Whitewater employee claims the school transferred a contract from the Whitewater Register because the firm did not contribute enough to a university building fund.

Dale Reich, former news and publications director for the university, has filed a claim with the state attorney general's office alleging retaliation when he informed the newspaper of the school's decision.

Reich claims he was demoted and his pay cut by $14,000 a year as a result of the incident.

Reich's claim alleges that Assistant Chancellor Michael Spellman announced in the fall of 1990 that the Register would not be awarded the printing contract.

Reich claims that was "because the principals of the Whitewater Register did not make what Spellman felt to be a sufficiently generous contribution for the new multi-purpose auditorium."

When Tom Coe, register editor and publisher, asked why the university transferred the contract, Reich told him

about Spellman's comments regarding contributions to the auditorium project, according to the claim.

Spellman admonished him for a "breach of management confidence," Reich said.

Coe would not comment on Reich's claim.

"I assume this will end up in court, so I don't think I should make any statements," he said.

Spellman would not comment directly on Reich's claim that he cut off the Register from the university contract because the newspaper rejected a request for a contribution.

The rejection "was not the primary factor" in transferring the printing contract, Spellman said.

"There was a problem with the Whitewater Register in the printing of the summer issue of the UW-Whitewater Today, a campus publication funded by the UW-Whitewater Foundation. A decision was made to transfer the printing contract to another vendor.

"In the months that followed, efforts were made to explain this action to the owners of the Whitewater Register and since that time the issue has been fully resolved with them," Spellman said.

"The relationship today between the UW-Whitewater Foundation and the Whitewater Register is strong and

positive.

"It is inappropriate for me to provide any further personal comment at this time while a claim is pending, as it is the university policy not to discuss personnel claims," Spellman said.

"I am cooperating with all concerned parties, and I look forward to a proper conclusion in the near future."

In November 1990, Reich said, he resigned over the matter, but his letter of resignation was torn up by Chancellor James Connor.

In January, Reich said, Connor told him his letter of resignation would be accepted, although he could stay on at the school until July 1.

Spellman then relieved him of his duties as director of news and publications and reassigned him at the same pay level until July 2.

Then Chancellor H. Gaylon Greenhill, who had replaced Connor, reassigned him to the Office of Continuing Education as an outreach program specialist for about $14,000 less in annual salary, Reich said.

Reich resigned from the University at the end of October.

University officials, including Spellman, Connor and Greenhill, "retaliated for disclosing information (I) reasonably believed demonstrated a violation of state law and mismanagement

or abuse of authority in state government," Reich said in his claim.

Reich claims he suffered emotionally, economically and in reputation as a result of the retaliation.

Assistant Attorney General Charles Hoornstra is reviewing the claim.

"We are in the process of looking into the claim and legal counsel for the university system is assisting," Hoornstra said.

"I expect to have a decision in a couple of weeks."

No demands were made in the claim.

If the state denies his claim, Reich can pursue the matter through a suit in the Walworth County Circuit Court.

Reich received a bachelor's degree from Whitewater in 1972 and a master's degree in 1977. He served as managing editor of the Register and a journalism instructor in the UW-Whitewater Department of Communications before becoming director of news and publications in 1978.

Daily Jefferson County Union

Monday, December 9, 1991

"Reich files claim against the UW"

WHITEWATER (AP) -- A foundation associated with the University of Wisconsin-Whitewater canceled its contract with a company that didn't donate money to a campus fund, state Justice Department records show.

Dale Reich, former publications director for the college, says he quit his job under pressure after he was reprimanded for commenting on the contract affair.

Besides unemployment compensation, Reich filed a claim against the state, asking unspecified compensation for personal financial and emotional loss.

Charles Hoornstra, an assistant attorney general, says the state needn't pay the claim. The University Foundation, not the university itself, handled the contract and isn't subject to laws regulating state contract, he said.

Reich says assistant chancellor Michael Spellman wanted to deny a printing contract to the Whitewater Register because the company didn't contribute to an auditorium project.

"It is true that the assistant chancellor stated that a contract should not be awarded to a contractor who declined to contribute to a University

Foundation fund-raising project," Hoornstra said in a letter to Reich's attorney.

Spellman, in a written response quoted last week by the Janesville Gazette, insisted the Register's failure to contribute "was not the primary factor" in shifting the contract.

Reich says he submitted his resignation after Spellman reprimanded him for "breach of management confidence."

Chancellor James Connor would not accept his resignation and persuaded him to stay, Reich said.

Two months later, however, Connor could not find another job for him and decided to accept the resignation, Reich said. he said he then decided to quit in October after Spellman demoted him to a job paying $14,000 less per year.

The underlying reason for Reich's resignation "was his disappointment in his prior personnel evaluation," Hoornstra wrote, "not the decision of his supervisor not to aware a certain contract."

Another reason to deny Reich's claim is that it was not filed within the 120-day period established by state law, Hoornstra said.

Vince Barker, a Janesville examiner with the state Department of Industry Labor and Human Relations, said Reich was entitled to unemployment checks.

Reich "quit his work with good cause attributable to the employer," Barker said. "The employee quit after receiving a demotion and substantial salary reduction.... It appears that these action by the employer were taken more out of retaliation...."

The university can appeal the ruling.

Reich meanwhile, could respond to Hoonstra's [sic] claim denial by filing suit in Walworth County Circuit Court.

The Janesville Gazette

June 1, 1994

"Phone call turns UW-W supporter into its biggest critic"

By Stan Milam
Gazette Staff

WHITEWATER-When he came to UW-Whitewater in 1969, Dale Reich didn't know he would be allied to the school for the next 22 years.

And during the more than two decades he studied taught and worked at the university, Reich never dreamed he'd leave under such confrontational circumstances.

UW-W became such and important part of Reich's life that he could not imagine leaving, much less quitting in desperation and filing suit against his alma mater.

The tortured legal battle started in the final weeks of 1991, when Reich says he was forced to quit. The previous year had seen him lose his job as director of the UW-W News and Publications Department, a post he had held since 1978.

Reich's unprecedented transformation from one of the school's most vigorous supporters to its most prominent critic is the result of a phone call he received in October 1990.

Reich's account of the events that led up to his suit reported in this story were gleaned from court documents and

interviews before he filed suit against the university. His lawyer has advised him not to comment on the case while the suit is pending.

The October 1990 phone call was from Tom Coe, the owner of the Whitewater Register and an associated print ship. Part of Coe's printing business relies on contracts with the university.

Coe called Reich to ask why his firm had lost a contract with school's alumni association, the UW-Whitewater Foundation. Reich told him the contract, for the printing of the foundation's newsletter, UW-Whitewater Today, was canceled because of poor printing quality.

But a minute after the call ended, Reich called Coe back to tell him there was another reason. Coe also lost the contract, Reich told him, because Coe refused to contribute to the university's auditorium fund drive.

Reich's superiors, who included then-chancellor James Connor and Michael Spellman, the assistant chancellor for university relation, were not pleased with Reich's second telephone conversation. A couple of days after the call, Reich was summoned to Connor's office.

Reich says Connor reprimanded him for "disclosing Mike's dirty laundry" and embarrassing the school.

Spellman confirmed in an Oct. 30, 1990, memo that the lack of a contribution from Coe was a factor in not renewing the

contract.

"I indicated that I had in fact told the staff that I felt no further obligation and desire to do any additional Foundation business with the Register if they do not appreciate the almost $250,00-plus business we have done with them over the past three years," Spellman said. "I indicated to Tom Coe that I had made that statement in the heat of battle and that I was in error and would like bygones to be bygones."

At the same meeting in which he was reprimanded, Reich said, he was told that changes in his employment were planned.

A few days later, Reich submitted a letter of resignation.

Connor eventually talked him out of resigning, Reich said, and offered him a job elsewhere in the university. Reich quit Oct. 31, 1991, citing intolerable pay cuts (his annual salary was cut by $14,000), humiliating work assignments and tasks requiring training he did not have.

Since he left the university, Reich has lost his home, his savings and his retirement account in addition to his job. He substitute-teaches in area schools and earns additional income as a free-lance writer for several publication, including The Janesville Gazette.

Reich's suit against the university claims that his reputation was tarnished and he suffered emotionally and economically when the school retaliated

for his disclosing Spellman's decision to award a contract based on the contributions to the school. The university counters that:

- The contract in question was between Coe and a charitable foundation that supports the university, and therefore the contract was not subject to state bidding requirements.

- Failure by the printer to make a contribution to the auditorium fund is not a "forbidden" reason for refusal to contract with the printer again.

- In any case, the university acted to keep Reich employed; Reich accepted a new position and later quit.

The university also cites the "limited immunity" defense, which protects certain governmental bodies from lawsuits. The immunity grants protection when an otherwise illegal act is committed, such as punishing a so-called whistle-blower, if the act was not knowingly committed.

Reich initially was awarded unemployment compensation, but the state successfully appealed that ruling.

Jefferson County Circuit Court Judge John Ullsvik later reinstated Reich's unemployment compensation eligibility. The judge's November 1993, decision provides some of the most pointed criticism of Spellman and the university:

"The (UW-Whitewater) foundation does not appear to be very separate from the

university," Ullsvik said. "The court is also troubled by the circumstances of an assistant chancellor, a state employee, prohibiting contracting with a contractor in part for the reason that the contractor failed to make a gift for state university."

Ullsvik's decision is Reich's only victory in his ongoing fight.

After filing a claim with the state citing retaliation by UW-Whitewater, which the state denied, Reich filed his lawsuit in Walworth County Circuit Court Judge John Race summarily dismissed Reich's suit on the basis of the limited immunity defense.

Reich appealed the lower court ruling. The District 2 Court of Appeals is expected to release its decision today.

The case hinges on complicated legal issues, as most civil lawsuits do, but Reich sees it as a matter of public accountability. He said he feels he was forced out of the university for refusing to lie.

The state is vigorously defending the school and Spellman. Michael Losse, an assistant attorney general, offered to settle the claim in September by agreeing not to go after Reich for costs if he would drop the suit.

Reich is asking for compensatory and punitive damages. But he says he's lost more than just wages.

"I lost my career, but I also lost my respect for what I thought was a great institution," he said. "There's more at stake here than money."

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The Janesville Gazette

June 1, 1994

"REICH LOSES SUIT"

MADISON-A state Court of Appeals ruled against Dale Reich this morning, but Reich's lawyer says he will appeal.

Reich has no right to sue the UW-Whitewater or its officials even if his First Amendment right to free speech was violated, the court ruled.

The court agreed with a lower court ruling that the school and its officials are immune from a suit.

"Our Supreme Court has recognized that an employer's interest in confidentiality and discipline can outweigh an employee's interest in free speech," The Appeals Court said. "The defendants are entitled to qualified immunity if they can show that they were acting pursuant to a superior interest. They argue that they had a superior interest in deterring other employees from attempting Reich's tactics. We are satisfied that the defendant's need for confidentiality, the need to encourage a close and personal relationship between Reich and his superiors and the time, place and manner of Reich's speech weigh against Reich's interest in free speech."

Reich's attorney, Russell Devitt of Whitewater, said this morning he had not received a copy of the decision.

"Therefore I can't comment on the decision, but I can say that I'm fairly confident we will ask the Supreme Court to review the decision.

Milwaukee Sentinel

June 2, 1994

"Employee's honesty ruled inappropriate"

By MIKE MULVEY
Waukesha County Bureau

Waukesha -- A moral repugnancy to lying doesn't protect from discipline a former University of Wisconsin-Whitewater official who disobeyed a superior when he told the truth, a state appellate court ruled Wednesday.

Dale E. Reich, former UW-Whitewater director of News and Publication, was not exercising his First Amendment right to protected free speech when he told a contractor it was being dumped for giving a less-than-generous donation to the university, said the 2nd District Court of Appeals in Waukesha.

The appellate panel said that by disobeying a superior who had allegedly instructed him to lie to the contractor, Reich undermined the working relationship he had with university administrators and threatened the morale of co-workers.

Reich forfeited his protection as a "whistle-blower," in part, because the university's need to trust its employees outweighed his moral dilemma, the appellate court said.

According to the appellate court:

Reich lost his job in 1991 after

Assistant Chancellor Michael Spellman told him to stop giving business to a printing firm "that had not made a sufficient contribution to a fund-raising campaign that Spellman was conducting" for a new auditorium.

Spellman instructed Reich to tell the firm the university was unhappy with the quality of the printing. Reich initially gave that reason, but later felt guilty and told the truth to the firm.

His chagrined superiors threatened firing him, then reassigned him to a lower paying job. Reich later quit and filed suit in Walworth County Circuit Court.

Judge John R. Race granted summary judgment in favor of the university last year. Reich appealed.

Reich's case would have been bolstered had he shown that the university had broken the law by its practices, the appellate panel noted.

"Reich does not assert that he believed any laws were broken by the defendants," the appeal court said. "He only states that he found their bidding practices immoral."

Reich's attorney, Russell W. Devitt, said he would now appeal to the state Supreme Court.

"He went along with what he was told to do until his conscience no longer allowed it," Devitt said.

The Janesville Gazette

July 9, 1994

"Former UW-Whitewater employee asks court to reconsider ruling"

By Stan Milam
Gazette Staff

MADISON -- Dale Reich has taken his case against UW-Whitewater to what may be the final step in a nearly four-year battle with the school.

Reich is a Milton resident whose writings as a correspondent appear in the Gazette.

He claims the university illegally retaliated against him when he disclosed that a local printing company, The Whitewater Register, was denied an alumni association printing job because it had not contributed enough to the school's auditorium building fund.

Reich resigned after being transferred and demoted from his original position as director of the News and Publications Office.

Reich's transfer and demotion followed verbal and written reprimands from his immediate supervisor, assistant chancellor Michael Spellman.

With the exception of a ruling that he was entitled to unemployment compensation, Reich has lost in each step of his legal battle with the school.

Walworth County Circuit Court Judge John Race dismissed Reich's suit after ruling that the school enjoys the legal concept of qualified immunity. Race also ruled that Reich filed a claim with the state after the legal deadline.

Reich appealed Race's ruling to the District 3 Court of Appeals. The Appeals Court rejected the appeal, as did the Wisconsin Supreme Court when Reich filed an appeal there.

Reich has now asked the Supreme Court to reconsider its decision. His petition for review cites a recent decision by the high court in the case of a State Investment Board employee.

That employee claims he was illegally fired for disclosing what he believes is incriminating information about a lobbyist who represented a client before the board.

The issue of whether Spellman's linking of contributions to university-related jobs by local businesses was illegal is not being discussed in the appellate maneuvering.

At issue in the legal arena is whether the university is immune from responsibility for limiting an employee's right to free speech and whether Reich filed his initial claim with the state in a timely fashion.

Reich's Whitewater attorneys, Russell Devitt and David Honan, argue that Reich's right to free speech outweighs the university's need for confidentiality.

The university argued that Spelman [sic] was the sole target of Reich's free speech and his disclosure was nothing other than a breach of confidence. But Reich argues that he would not lie to a member of the public about what he believed was a policy that constituted mismanagement, a possible waste of public funds, and actions that he believed were in violation of fund-raising ethical standards, if not outright illegal.

"Incredibly, the Court of Appeals concluded that the (university) had an interest in confidentiality associated with the shakedown policy that had been initiated and applied against Whitewater businesses and in Spellman's direction to Reich 'not to tell The Register that it was losing the printing contract because of its failure to donate money to Spellman's fund-raising campaign,'" Devitt said in his petition for review.

"In other words, the court found that the (university) had a legitimate interest in ordering a state employee to lie to and intentionally mislead a member of the general public," Devitt said. "It is ludicrous to suggest that the (university) has any legitimate interest in confidentiality associated with either the questionable fund-raising practices employed or in Spellman's order to Reich to keep quite about them."

Reich claims that the triggering date to file a claim with the state was June 1991 when the Chancellor James Connor assigned Reich to a new position. The lower courts ruled that the triggering

date was in January 1991 when Connor accepted Reich's resignation, but also agreed to extend the resignation date to June 30 to look for other employment at the campus.

"This will give you the opportunity to seek alternative employment and also will give me added time to see whether there is an assignment here which would be attractive enough for you to continue here," Connor wrote.

"The fact remains that the triggering date for Reich's state claim is the June 1991 retaliatory transfer and demotion and not a termination which never occurred," Devitt said.

Devitt maintains the state received the proper 120-day notice of a claim based on the triggering date of June 1991.

UW-Whitewater Chancellor H. Gaylon Greenhill had a brief two-sentence response to Reich's petition for review.

"The university's position has been upheld by two lower courts on the county and state appeals lever," he said. "If this case proceeds any further, we look forward to a final positive outcome before the state Supreme Court."

The state has until Monday to respond to Reich's petition for review.

The Janesville Gazette

July 20, 1994

"Free speech suit goes to High Court"

Former UW-Whitewater worker
appeals retaliation claim

By Stan Milam
Gazette Staff

MADISON-It's now up to the Wisconsin Supreme Court to decide wither a former UW-Whitewater employee can sue school officials for retaliation.

Dale Reich, the former director of the UW-W News and Publications Department, claims he was demoted for disclosing that a local printer lost an alumni association job because he did not donate enough to a school building fund.

Reich later quit his job at the school and sued Michael Spellman, an assistant chancellor, former chancellor James Connor, and the UW Board of Regents.

His work as a free-lance writer often appears in the Janesville Gazette.

Reich's suit was summarily dismissed in Walworth County Court. Judge John Race ruled that the defendants enjoyed the legal protection called qualified immunity from Reich's claims. Race also said that Reich failed to file a claim before the legal deadline.

The District 2 Court of Appeals upheld Race's rulings.

Reich then asked the Supreme Court to review the Appeals Court decision.

Reich's petition for review "is a confused mass of inaccurate 'facts' without citation to the record and without legal citations," said Michael Losse, an assistant attorney general who represents the defendants in the case. "This case involves qualified immunity, not retaliation on the merits."

Previous court rulings in the defendants' favor indicate that Reich's right to free speech does not outweigh the defendants' interest in confidentiality.

But, Losse said, Reich would not fare well even if the case were decided on the merits.

Public employees may criticize their supervisors, but the employee can escape discipline only if the criticism is not a personal gripe, Losse said.

Reich intended to embarrass and humiliate Spellman in front of an important client without warning, Losse said.

"The right to criticize is not the right to sabotage," Losse said. "The UW-Whitewater and alumni foundation, which have innumerable business contacts in the community providing bother services and sources of contributions, have similar interest in deterring other employees from attempting (Reich's) tactics."

Losse admits that Spellman ordered

Reich not to tell the printer that one reason he did not get an alumni association printing job was because the printer did not contribute sufficiently to a school building fund.

But Losse denies Reich's claim that Spellman ordered him to mislead the public.

"The record demonstrates that Spellman told (Reich) that if the current printer inquired, he was to be told that the business was to be taken elsewhere because of printing problems without mention of the factor that he failed to make an adequate contribution," Losse said. "Misleading the public was never an issue."

Losse insists in his response that whether the defendants enjoy qualified immunity is a matter of law, not fact. As such, Losse said, a judge, not a jury should decide the case.

Reich's attorney, Russell Devitt of Whitewater, says the case should go to a jury.

"The issue is whether this case should be decided on its merits," Devitt said. "It is painfully obvious that state's position is that whatever the defendants did is immune. We simply do not agree with that.

"If they can tell someone to lie and then reprimand that employee for refusing to lie, is there anything they are not immune from? We believe a jury would not

agree with the state's position and that's why we want the Supreme court to first of all take this case and then decide that it should go back to Walworth County for a jury trial.

There are four possible results from Reich's request to have the Supreme Court review the case. The court could agree to Reich's request, it could deny the request, the Court of Appeals could review its decision on its own motion or Reich could petition the federal court to intervene if he receives no relief at the state level.

UNIVERSITY OF WISCONSIN-WHITEWATER
800 West Main Street, Whitewater,
Wisconsin 53190-1790
Office of the Chancellor

MEMORANDUM

TO: UW-Whitewater Faculty and Staff
UW-Whitewater Emeriti

FROM: Chancellor H. Gaylon Greenhill
/s/

DATE: June 15, 1994

RE: Dale Reich vs Michael Spellman, James Connor and the Board of Regents of the UW-System

Since the Wisconsin Court of Appeals II unanimously sustained the Walworth County Circuit Court in its decision against Dale Reich last week, there has been a concerted media campaign against Michael Spellman and the University. One sided stories have appeared in each of the daily newspapers of southern Wisconsin and the case has been the subject of the talk radio show of WTMJ personality, Charles Sykes.

To give some perspective to the recent media barrage, the University has released the enclosed statement. As you are well aware, it is difficult to defend oneself in the court of public opinion. There is, however, every indication that the legal case will be won at the Wisconsin Supreme Court if it is heard there just as it has prevailed at the Circuit Court and Wisconsin Circuit Court of Appeals levels.

The facts of the case are not as portrayed in the media. First, Dale Reich was not fired from his job at the University. He resigned of his own volition. As Director of the News and Public Affairs, he was a line administrator serving in what we call a "limited" position. All line administrators from the department chair through Chancellor serve "at the pleasure of their supervisor." This means that they can be removed from the limited position and reassigned to their back-up position if the hold a tenured faculty position or indefinite status in the academic staff. In Reich's case, he held indefinite status in the academic staff and was reassigned as an Outreach Manager by then Chancellor Connor. Dale Reich would be employed in that position today had he not, completely of his own volition, resigned from the University. After resigning, he began to claim that he was "fired" which simply is not the case.

I am very concerned that this unfair media barrage not damage the reputation of Assistant Chancellor Spellman, Chancellor Emeritus Connor nor the UW-Whitewater. Please be assured that neither Spellman nor Connor have acted improperly.

Please be assured of my continued confidence in Assistant Chancellor Michael Spellman to carry on his important assignments at UW-Whitewater, not the lease of which, is the Excellence for the 21st Century Campaign. If you would like any further information on this case, please call or write me.

HGG:rg
Enclosure
Phone: 414/472-1918 Fax: 414-472-1518

UNIVERSITY OF WISCONSIN-WHITEWATER
800 West Main Street, Whitewater,
Wisconsin 53190-1790
Office of News and Public Affairs
Phone: (414)472-1193 Fax (414) 472-1196

[OFFICIAL PRESS RELEASE]

June 8, 1994
Contact: Walt Ulbricht (414) 472-1193

Wisconsin Court of Appeals Upholds UW-Whitewater in "Whistleblower" Case

WHITEWATER -- The Wisconsin Court of Appeals District II unanimously affirmed on Wednesday, June 1 a lower court's dismissal of a lawsuit brought against two UW-Whitewater officials.

Dale Reich, former director of news and publications, sued former UW-Whitewater Chancellor James R. Connor and Assistant Chancellor Michael Spellman for retaliation against his exercise of free speech under federal law and the state "whistleblower" act. Reich alleged that Spellman an Connor unlawfully disciplined and transferred him to a lower paying position after he disclosed that a local printer, the Whitewater Register, had lost a contract to the UW-Whitewater Foundation, in part, for not making a sufficient contribution to an auditorium fund raising campaign.

The Court of Appeals affirmed the Walworth County Circuit Court's decision that the legal doctrine of "qualified immunity" barred Reich's claim that federal law was violated. In addition, the Court of

Appeals rejected the plaintiff's state law "whistleblower" claim because Reich and his attorneys failed to file a timely notice of claim within the required 120-day period.

The Wisconsin Department of Justice, defending UW-Whitewater and its employees, argued that Reich was characterizing himself as a "whistleblower" in order to legitimize his own campaign of retaliation against Spellman, who had defeated Reich in competition for the position of assistant chancellor of university relations and given Reich a negative evaluation prior to Reich's alleged "whistleblowing."

The Department of Justice argued that court papers filed by the plaintiff show that Reich's alleged pangs of conscience were non-existent until his poor performance review, making his protestations of "whistleblowing" suspect. It demonstrated that Reich in his official duties himself decided to cancel the printing contract with the Whitewater Register due to printing quality-control problems.

STATE OF WISCONSIN JEFFERSON COUNTY
CIRCUIT COURT

DALE E. REICH,

Plaintiff,

vs. Case No. 92-CV-509

LABOR AND INDUSTRY REVIEW COMMISSION
and UNIVERSITY OF WISCONSIN-WHITEWATER,

Defendants.

MEMORANDUM DECISION[*]

. . . Reprimanding an employee and planning to change his employment for disclosing something unlawful or unethical about the employer's business practice may be "real and substantial" fault occasioned by the employer justifying the employee's resignation. [Citations omitted].

The Court is not satisfied by the record that contract bidding requirements did not apply here. The foundation does not appear to be very separate from the University. The Court is also troubled by the circumstance of an Assistant Chancellor, a State employee, prohibiting contracting with a contractor in part for

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*This is a partial excerpt (pages 12-13) from a companion Memorandum Decision stemming from the petitioner's appeal of an adverse unemployment compensation decision by the administering agency. The petitioner argued that his departure from the University following his transfer and demotion constituted a constructive discharge.

the reason that the contractor failed to make a gift for a State University. It appears in this case that the decision to not contract with the printer again was made not by a separate foundation, but by the Assistant Chancellor, acting for the University. It is true, as the Assistant Attorney General argues, that there can be no extortion unless the person being extorted knows that he must give something to the extorter. In this case the necessity for a contractor to make a contribution to the auditorium fund, was evidently to be kept secret. Nevertheless, the Commission may want to conclude that contracts made or prohibited by a government official should in no way be conditioned upon payment of any extra benefit or kickback by the contractor, whether or not he knows the payment is required. Although there is no evidence of any risk of payment of a kickback in this case, refusal by the Assistant Chancellor to contract with a contractor in part because he failed to make a gift, is the first step on a slippery slope leading to distrust of government at least, and corruption at worst. Disclosure of such a potential harm is in the State's interest, not against it.

Dated this 3rd day of November, 1993.

BY THE COURT:

/s/_____
Honorable John M. Ullsvik
Circuit Judge